No. 14-8358

Title:	Avondale Lockhart, Petitioner v. United States
Docketed:	February 9, 2015
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(13-602)
Decision Date:	May 15, 2014
Rehearing Denied:	October 16, 2014

Questions Presented

—Date—	——Proceedings and Orders----------
Jan 14 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 11, 2015)
Mar 3 2015	Order extending time to file response to petition to and including April 10, 2015.
Apr 10 2015	Brief of respondent United States in opposition filed.
Apr 28 2015	Reply of petitioner Avondale Lockhart filed. (Distributed)
Apr 29 2015	DISTRIBUTED for Conference of May 14, 2015.
May 18 2015	DISTRIBUTED for Conference of May 21, 2015.
May 26 2015	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jun 23 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 24, 2015.
Jun 23 2015	The time to file respondent's brief on the merits is extended to and including September 8, 2015.
Jul 24 2015	Joint appendix filed. (Statement of costs received.)
Jul 24 2015	Brief of petitioner Avondale Lockhart filed.
Sep 8 2015	Brief of respondent United States filed.
Sep 9 2015	SET FOR ARGUMENT on Tuesday, November 3, 2015
Sep 10 2015	Record requested from the U.S.C.A. 2nd Circuit.
Sep 11 2015	Record request received from the U.S.C.A. 2nd Circuit is electronic.
Sep 21 2015	CIRCULATED
Oct 8 2015	Reply of petitioner Avondale Lockhart filed. (Distributed)
Nov 3 2015	Argued. For petitioner: Edward S. Zas, Assistant Federal Defender, New York, N. Y. For respondent: Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

No. 14-9358

In the

Supreme Court of the United States

Avondale Lockhart,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

Petition for a Writ of Certiorari

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Question Presented

Section 2252(b)(2) of title 18, U.S.C., requires a district court to impose a prison term of at least ten years on a defendant convicted of possessing child pornography if he "has a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."

The question presented is whether § 2252(b)(2)'s mandatory minimum sentence is triggered by a prior conviction under a state law relating to "aggravated sexual abuse" or "sexual abuse," even though the conviction did not "involv[e] a minor or ward," an issue that divides the federal courts of appeals.

Table of Contents

Page

Question Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Relevant Statutory Provisions 1

Statement of the Case 4

Reasons for Granting the Petition 13

A. The decision below deepens a circuit conflict over whether a prior state conviction involving an adult enhances a defendant's sentencing range under § 2252(b)(2) and materially identical penalty provisions. 14

B. This case is an ideal vehicle and the question is important. 24

C. The decision below is wrong. 26

Conclusion 32

Appendix

Opinion and Order of the United States Court of Appeals for the Second Circuit, *United States v. Lockhart*, No. 13-602-cr, filed May 15, 2014 ..... APP 01

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing, *United States v. Lockhart*, No. 13-602-cr, filed Oct. 16, 2014 ..... APP 20

Transcript of Sentencing, *United States v. Lockhart*,
No. 11 Cr. 231 (SJ), United States District Court
for the Eastern District of New York, dated Feb. 1, 2013 ..... APP 21

Judgment in a Criminal Case, *United States v.*
Lockhart, No. 11 Cr. 231-SJ, United States District Court
for the Eastern District of New York, filed Feb. 13, 2013 ..... APP 33

Table of Authorities

Cases

Barnhart v. Thomas,
540 U.S. 20 (2003) 29

Clay v. United States,
537 U.S. 522 (2003) 21

Descamps v. United States,
133 S. Ct. 2276 (2013) 25

Flores-Figueroa v. United States,
556 U.S. 646 (2009) 27

Jama v. Immigration and Customs Enforcement,
543 U.S. 335 (2005) 27

Paroline v. United States,
134 S. Ct. 1710 (2014) 26, 28, 29

Porto Rico Ruy., Light & Power Co. v. Mor,
253 U.S. 345 (1920) 26, 28, 29

Shepard v. United States,
544 U.S. 13 (2005) 16, 17, 18, 25

South Carolina v. White,
605 S.E.2d 540 (2004) 16

Taylor v. United States,
495 U.S. 575 (1990) 16

United States v. Bass,
404 U.S. 336 (1971) 27, 29

United States v. Beardsley,
691 F.3d 252 (2d Cir. 2012) 24

United States v. Becker,
625 F.3d 1309 (10th Cir. 2010) 11, 23, 25

United States v. Farmer,
627 F.3d 416 (9th Cir. 2010) 15

United States v. Hubbard,
480 F.3d 341 (5th Cir. 2007) ..... *passim*

United States v. Hunter,
505 F.3d 829 (8th Cir. 2007) 11, 19, 20, 21

United States v. Linngren,
652 F.3d 868 (8th Cir. 2011) 19, 20, 22

United States v. Mateen,
764 F.3d 627 (6th Cir. 2014) (en banc) ..... *passim*

United States v. Mateen,
739 F.3d 300 (6th Cir.), *vacated*,
764 F.3d 627 (6th Cir. 2014) (en banc) 18

United States v. McCutchen,
419 F.3d 1122 (10th Cir. 2005) 11, 22, 23, 25

United States v. Rezin,
322 F.3d 443 (7th Cir. 2003) 15, 22, 29

United States v. Roy,
114 F. Supp. 2d 1 (D. Me. 2000) 20

United States v. Sinerius,
504 F.3d 737 (9th Cir. 2007) 15, 18, 19, 22

United States v. Sonnenberg,
556 F.3d 667 (8th Cir. 2009) 20

United States v. Spence,
661 F.3d 194 (4th Cir. 2011) ..... *passim*

United States v. Trogdon,
339 F.3d 620 (8th Cir. 2003) 19, 20, 21, 25

United States v. Weis,
487 F.3d 1148 (8th Cir. 2007) 19, 20, 21, 25

United States v. Wiles,
642 F.3d 1198 (9th Cir. 2011) 19

Federal Statutes

18 U.S.C. § 1202(a) 27, 28

18 U.S.C. § 1461 30

18 U.S.C. § 1464 30

18 U.S.C. § 1591 30

18 U.S.C. § 2241 12

18 U.S.C. § 2242 12

18 U.S.C. § 2243 12

18 U.S.C. § 2251(e) 2, 26

18 U.S.C. § 2252(a)(4)(B) 4, 6

18 U.S.C. § 2252(b)(1) 2

18 U.S.C. § 2252(b)(2) ..... *passim*

18 U.S.C. § 2252A(b)(1) 3, 17, 18

18 U.S.C. § 2252A(b)(2) 3, 15, 16, 20

18 U.S.C. § 2259(b)(3) 28

18 U.S.C. § 3231 1

18 U.S.C. § 3742 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

State Statutes

Minn. Stat. § 609.3451, subdivision 1. 20

Mont. Code Ann. § 45-5-502 18

N.Y. Penal Law § 130.65(1) 7

Ohio Rev. Code § 2907.05 17

Okla. Stat. tit. 21, §§ 42, 1123(A)(1) 17

Other Authorities

S. Rep. No. 104-358, 104th Cong., 1996 WL 506545 (1996) 27, 31

U.S. Sentencing Comm'n, *2013 Sourcebook of Federal Sentencing Statistics* tbl.13, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table13.pdf 26-27

Petition for a Writ of Certiorari

Petitioner Avondale Lockhart respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The Second Circuit's opinion is reported at 749 F.3d 148 and appears at Appendix ("App.") 1-19. The Second Circuit's order denying panel rehearing and rehearing en banc appears at App. 20. The transcript of petitioner's sentencing proceeding in the Eastern District of New York appears at App. 21-32. The judgment of conviction appears at App. 33-42.

Jurisdiction

The district court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on February 13, 2013. The Second Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, entered judgment on May 15, 2014, and denied a timely petition for rehearing and rehearing en banc on October 16, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Statutory Provisions

Section 2251 of title 18, U.S.C., provides, in relevant part:

> Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse,

> sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years.

18 U.S.C. § 2251(e).

Section 2252(b)(1) of title 18, U.S.C., provides:

> Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

18 U.S.C. § 2252(b)(1).

Section 2252(b)(2) of title 18, U.S.C., provides, in relevant part:

> Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but ... if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 2252(b)(2).

Section 2252(A)(b)(1) of title 18, U.S.C., provides:

> Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

18 U.S.C. § 2252A(b)(1).

Section 2252A(b)(2) of title 18, U.S.C., provides, in relevant part:

> Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but ... if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 2252A(b)(2).

Statement of the Case

This case presents an ideal opportunity for the Court to resolve an acknowledged circuit conflict over an important and recurring question of statutory interpretation. Petitioner pleaded guilty in the United States District Court for the Eastern District of New York to possessing child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). That offense ordinarily carries no minimum prison sentence and a ten-year maximum term. But Section 2252(b)(2) requires a prison term of at least ten years (and increases the maximum prison sentence from ten to twenty years) if the defendant "has a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."

Petitioner had a prior New York State conviction for sexual abuse involving his adult girlfriend but not "involving a minor or ward." Nevertheless, the district court concluded that § 2252(b)(2)'s enhanced penalties applied and sentenced petitioner to the ten-year mandatory minimum term.

The Second Circuit affirmed, joining the Fourth, Fifth, Sixth, and Ninth Circuits in holding that the phrase "involving a minor or ward" modifies only the immediately preceding phrase "abusive sexual conduct." Consequently, under this interpretation, a prior state conviction "relating to aggravated sexual abuse or sexual abuse" that involves an adult victim, such

as petitioner's prior conviction, is a § 2252(b)(2) predicate. The Second Circuit acknowledged the Eighth Circuit's contrary view that any prior state sex-abuse conviction must involve a minor to trigger § 2252(b)(2)'s heightened sentencing range. The majority position disregards the statute's plain text and Congress's manifest intent to limit qualifying state predicates to crimes against children. This conflict, on an important question of statutory interpretation with significant consequences for criminal defendants and the uniform administration of federal criminal law, warrants this Court's review.

1. In 2010, aware that petitioner had once sent funds to a money courier for a company that distributed child pornography, federal law enforcement agents targeted petitioner in a sting. Officials mailed a letter to petitioner's home inviting him to purchase child pornography through a government-run website or mail-order catalogue. Petitioner ordered six DVDs described as depicting sexually explicit content involving children, paying with a $125 money order. The agents obtained a warrant to search petitioner's home. When petitioner accepted delivery from an undercover agent of a package said to contain the videos, other agents executed the warrant. They recovered nine videos and 15,000 images containing child pornography from the hard drive of petitioner's laptop computer.

Petitioner was 46 years old at the time of his arrest. He was born in Dominica and has lived in the U.S. Virgin Islands and the U.S. as a lawful permanent resident since he was seven. He lived principally in the New York

City area and worked as an aerobics instructor and bus driver until kidney disease, caused by years of heavy drinking, left him disabled. Petitioner also suffers from diabetes and deep-vein thrombosis. In 2007, petitioner underwent a kidney transplant and was homebound during his convalescence. Although he had maintained several long-term romantic relationships with women in the past, petitioner's illness kept him from engaging in sexual activity. While recuperating at home, petitioner bought a computer, his first, and grew addicted to readily available Internet pornography. Initially, petitioner viewed only adult pornography, but started responding to pop-up advertisements for child pornography and began viewing that material as well. Nonetheless, petitioner has never had sexual contact with a child. And a psychiatric evaluation prepared in connection with his sentencing concluded that petitioner was "not a pedophile, ... nor does he have any other paraphilia or hypersexual disorder."

2. Petitioner pleaded guilty in the Eastern District of New York to possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). That offense ordinarily carries a statutory range of imprisonment of zero to ten years, but a ten-year mandatory minimum and a twenty-year maximum apply if a defendant "has a prior conviction ... under the laws of any State

relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252(b)(2).[1]

Petitioner's Presentence Report ("PSR") calculated an advisory U.S. Sentencing Guidelines range of 78–97 months. But the PSR also concluded that petitioner's prior New York State conviction for sexual abuse subjected him to § 2252(b)(2)'s ten-year mandatory minimum and thus recommended a 120-month sentence. In 2000, petitioner had pleaded guilty to sexual abuse in the first degree, in violation of N.Y. Penal Law § 130.65(1), which provides: "A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact ... [b]y forcible compulsion." An arrest report in that case reflects that petitioner pinned down the victim, his 53-year-old girlfriend, held her wrists, ripped off her underpants, and attempted to penetrate her vagina with his penis. Petitioner was sentenced to five years' probation.

At his federal sentencing, petitioner objected to the application of the ten-year mandatory minimum, arguing that his prior conviction was not a

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[1] In full, § 2252(b)(2)'s enhanced sentencing range applies if a defendant "has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." Materially identical language appears in 18 U.S.C. §§ 2251(e) (penalties for production of child pornography), 2252(b)(1) (receipt and distribution of child pornography), 2252A(b)(1) (receipt and distribution of child pornography), and 2252A(b)(2) (possession of child pornography).

qualifying predicate because it did not "involv[e] a minor or ward." The district court (Hon. Sterling Johnson, Jr.) disagreed, ruling that "the plain reading of the statute negates that particular position" because petitioner's conduct "fits within that part of the statute that speaks of a state conviction for aggravated sexual abuse." App. 23. The court sentenced petitioner to the ten-year mandatory minimum, finding that term "sufficient, after considering the factors in [§] 3553(a)." App. 28.

3. The Second Circuit (Katzmann, C.J., joined by Straub and Lohier, JJ.) affirmed. App. 1-19. The court held that the phrase "involving a minor or ward" modifies only "abusive sexual conduct," such that a state conviction "relating to aggravated sexual abuse or sexual abuse" is a § 2252(b)(2) predicate even if it involves an adult victim only.

The Second Circuit began by considering "which rule of statutory construction should inform our understanding of the phrase 'relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor': the last antecedent rule or the series qualifier canon." App. 7. Respondent urged application of the last antecedent rule, according to which "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." App. 7 (citations omitted). Under that rule, "involving a minor or ward" would modify only the immediately preceding antecedent, "abusive sexual conduct." Petitioner, in contrast, urged application of the series qualifier canon, which "provides that a modifier at

the beginning or end of a series of terms modifies all the terms." App. 8 (citation omitted). The series qualifier canon applies where "the modifying clause appears at the end of a single, integrated list, ... undeniably applies to one antecedent, and makes sense with all." App. 8 (citations and alterations omitted). Under that rule, "involving a minor or ward" would modify all three categories of state offenses: "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct."

Based on "the language and structure of this statutory phrase alone," the Second Circuit was "not fully persuaded that either canon applies unambiguously." App. 9. Cutting against petitioner's view, for example, was the fact that the list of predicate state-law offenses "itself falls in the middle of a longer list of qualifying predicate crimes; that is, the modifier does not end the list in its entirety." App. 9. Similarly, the court of appeals rejected petitioner's position that the three types of state sex offenses formed a "continuum of conduct," each element of which should be modified by "involving a minor or ward." App. 10. On that reading, the court observed, "'abusive sexual conduct involving a minor' seemingly would encompass anything that constitutes 'sexual abuse involving a minor,'" offending the rule against surplusage. App. 10-11. But the Second Circuit also rejected Respondent's argument that the absence of a comma between "abusive sexual conduct" and "involving a minor or ward" proved that "involving a minor or ward" was meant to be read only with "abusive sexual conduct." App. 11.

Although a comma separating a modifying phrase from a list often indicates the drafter's intent that the phrase modify all elements of the list, not just the last antecedent, that rule is not "hard and fast," and a comma was "grammatically unnecessary." App. 11-12.

Finding neither canon dispositive, the Second Circuit turned to "the remainder of § 2252(b)(2) and ... its overall scheme." App. 13. Section 2252(b)(2) also lists as predicates prior convictions under "this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice)." App. 13. Those statutes "prohibit sexual conduct, including conduct that may have both minor and adult victims." App. 13. The court of appeals deemed it "important[]" that "§ 2252(b)(2) does not specify that a conviction under a federal statute must involve a minor; a violation of any of these statutory provisions constitutes a predicate offense ... regardless of the age of the victim." App. 14. The Second Circuit embraced the reasoning of other courts of appeals that "'it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law.'" App. 14 (quoting *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011), and citing similar analyses from the Fifth, Seventh, and Ninth Circuits). On the strength of that argument, the Second Circuit concluded that "'involving a minor or ward' modifies only prior state convictions for 'abusive sexual conduct,' not those for 'sexual

abuse' or 'aggravated sexual abuse,' each of which would constitute a predicate *federal* offense if committed against an adult or a child." App. 15.

The court of appeals acknowledged that the Sixth, Eighth, and Tenth Circuits had reached "the opposite conclusion, namely that the phrase 'involving a minor or ward' modifies all three categories of state sexual abuse crimes." App. 15.[2] But, the Second Circuit said, the Eighth and Tenth Circuits had "drawn this conclusion without elaborating on their reasoning. Indeed, these circuits appear merely to have assumed that a prior state-law sexual abuse conviction requires a minor victim for purposes of the enhancement, an assumption that made little difference in those cases since the predicate violations at issue involved minor victims." App. 15-16 (citing *United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007); *United States v. McCutchen*, 419 F.3d 1122, 1125 (10th Cir. 2005)).

Finally, the Second Circuit rejected petitioner's argument that Congress had limited state-law predicate offenses in this and related sentencing-enhancement provisions to offenses involving minors, such that the same limitation was applicable to "aggravated sexual abuse" and "sexual abuse." *See* 18 U.S.C. §§ 2252(b)(2) (state offenses involving "child

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[2] The en banc Sixth Circuit later held that "involving a minor or ward" modifies only "abusive sexual conduct." *United States v. Mateen*, 764 F.3d 627, 628–29 (6th Cir. 2014) (en banc). Also, as discussed below, *see infra* pp. 22–23, the Tenth Circuit has suggested that the question "whether the sexual abuse of adults would qualify as a predicate offense under § 2252(b)" remains open in that court. *United States v. Becker*, 625 F.3d 1309, 1312 n.3 (10th Cir. 2010).

pornography"), 2251(e) (state offenses relating to "sex trafficking of children"). The court of appeals allowed that there was "some logic to this position," but found it no more reasonable than "the assumption that Congress would intend for courts to treat prior sexual abuse convictions similarly, regardless of whether the conviction was under federal or state law." App. 17. That view was reinforced, the Second Circuit thought, by comparing the three categories of state-law predicates to their federal analogues: 18 U.S.C. §§ 2241 (aggravated sexual abuse), 2242 (sexual abuse), and 2243 (sexual abuse of a minor). Aggravated sexual abuse and sexual abuse apply to adults and minors; only sexual abuse of a minor requires a minor victim, suggesting that "Congress intended to impart a similar structure to state-law predicate offenses" under § 2252(b)(2). App. 18.

The Second Circuit denied panel rehearing and rehearing en banc. App. 20.

Reasons for Granting the Petition

The Court should grant certiorari to resolve the acknowledged conflict over the important and recurring question of federal statutory interpretation at the heart of this case. In the decision below, the Second Circuit recognized that it was deepening an existing split over whether a prior state conviction involving an adult victim serves to enhance a defendant's minimum and maximum sentences under § 2252(b)(2) and analogous provisions. The Second Circuit's affirmative answer, while consistent with decisions of the Fourth, Fifth, Sixth, and Ninth Circuits, conflicts with the Eighth Circuit's rule that only convictions involving minors qualify. The Tenth Circuit has indicated that the question is unresolved but suggested unease with the majority position.

This pure question of statutory interpretation warrants this Court's review. The question is of substantial practical importance, as the answer has significant consequences for many criminal defendants and affects the uniform administration of federal criminal law. This case offers an ideal vehicle because the question is preserved, the answer will have a substantial effect on petitioner's sentence, and the parties do not dispute the circumstances of petitioner's prior conviction, which involved a victim who was, and was known to be, an adult. On the merits, the Second Circuit's position is wrong because it disregards the statute's plain text and Congress's

manifest intent to limit qualifying state predicates to crimes against children. The petition should be granted.

A. The decision below deepens a circuit conflict over whether a prior state conviction involving an adult enhances a defendant's sentencing range under § 2252(b)(2) and materially identical penalty provisions.

The Second Circuit's decision exacerbates a conflict among the courts of appeals over whether a prior state conviction involving an adult serves to enhance a defendant's mandatory minimum and maximum sentence under § 2252(b)(2) and materially identical provisions.[3] Several courts have acknowledged the conflict. *See, e.g.*, App. 15 (op. below); *United States v. Mateen*, 764 F.3d 627, 632 (6th Cir. 2014) (en banc). This Court's review is warranted to resolve the split.

1. **The majority position**: Five circuits—the Second, Fourth, Fifth, Sixth, and Ninth—have held that the phrase "involving a minor or ward" modifies only "abusive sexual conduct," such that a prior conviction involving an adult is a predicate offense if it "relat[es] to" "aggravated sexual abuse" or "sexual abuse." App. 19 (2d Cir.); *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011) ("[W]e conclude that 'aggravated sexual abuse,' 'sexual abuse,' and 'abusive sexual conduct involving a minor' are three distinct categories of

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[3] The operative statutory language appears not only in § 2252(b)(2), but also in §§ 2251(e) (increasing sentencing range for production of child pornography from 15–30 years to 25–50 years); 2251(b(1) (increasing range for transporting, receiving, or distributing child pornography from 5–20 years to 15–40 years); 2252A(b)(1) (same as § 2252(b)(1)); and 2252A(b)(2) (same as § 2252(b)(2)).

predicate state law offenses set forth in 18 U.S.C. § 2252A(b)(2)."); *United States v. Hubbard*, 480 F.3d 341, 350 (5th Cir. 2007) ("[Section] 2252A(b)(1) does not require aggravated sexual abuse or sexual abuse of a minor. Read in context, the phrase 'involving a minor' modifies only 'abusive conduct.'"); *United States v. Mateen*, 764 F.3d 627, 628-29 (6th Cir. 2014) (en banc) ("[T]he phrase 'involving a minor or ward' ... modifies only 'abusive sexual conduct' and, accordingly, only state crimes relating to abusive sexual conduct need involve a minor or ward in order to trigger enhancement under § 2252(b)(2)."); *United States v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007) ("Section 2252A(b) requires an enhanced sentence if [the defendant's prior] conviction is as an offense 'relating to' either 'aggravated sexual abuse,' 'sexual abuse,' or 'abusive sexual conduct involving a minor.'"); *see also United States v. Farmer*, 627 F.3d 416, 418 (9th Cir. 2010) ("As its text makes clear, § 2252A(b)(2) refers to three separate offenses: "'aggravated sexual abuse, sexual abuse, and abusive sexual conduct involving a minor [or ward].'").

In dicta, the Seventh Circuit has agreed. *United States v. Rezin*, 322 F.3d 443, 448 (7th Cir. 2003) (dismissing defendant's argument that "'involving a minor' in section 2252(b)(2) qualifies not just 'abusive sexual conduct' but also 'aggravated sexual abuse' and 'sexual abuse' because "it would have been strange had Congress on the one hand authorized heavier punishment for offenders who had a prior *federal* conviction for a sexual

crime whether or not it involved a minor, and on the other hand insisted that if the prior conviction had been for a state offense, even one identical to one of the enumerated federal offenses, the victim had to be a minor").

Under the majority position, neither the elements nor the underlying facts of a defendant's prior state offense need establish that the victim was a minor, as long as the conviction "relat[es] to" "aggravated sexual abuse" or "sexual abuse." Consequently, like the Second Circuit below, other courts on the long side of the split have affirmed application of the enhancement absent judicially cognizable evidence of the victim's minor status.

a. For example, in *Spence*, the Fourth Circuit held that the defendant's conviction under South Carolina common law for assault and battery of a high and aggravated nature triggered § 2252A(b)(2)'s enhancement because it "relate[d] to sexual abuse," even though nothing established that the victim was a minor. 661 F.3d at 200. The Fourth Circuit first applied the categorical approach, *see Taylor v. United States*, 495 U.S. 575 (1990), and concluded that the defendant's prior offense was not a categorical match because South Carolina law defined the offense only as "an unlawful act of violent injury accompanied by circumstances of aggravation." 661 F.3d at 199 (quoting *South Carolina v. White*, 605 S.E.2d 540, 543 (2004)). Because some "circumstances of aggravation" would relate to sexual abuse but others would not, the Fourth Circuit applied the modified categorical approach and consulted the indictment to ascertain how the

defendant had committed his prior offense, *see Shepard v. United States*, 544 U.S. 13 (2005). The Fourth Circuit determined that the defendant had "touch[ed] the victim between her legs, which constitutes indecent liberties with a female," and that there was "a difference in the sex and a great disparity in the ages and physical conditions between [the defendant] and the victim." *Id.* at 199–200. Those circumstances sufficed to trigger the enhancement because they established that the defendant's prior was both abusive and sexual, even though they did not establish that the victim was a minor. *Id.*

b. Similarly, in *Hubbard*, the Fifth Circuit upheld application of § 2252A(b)(1)'s enhancement based on the defendant's prior conviction under Oklahoma law for attempting to make lewd or indecent proposals to engage in sexual relations with a person he believed to be a minor, but who was actually an adult undercover agent. 480 F.3d at 343 & n.1 (citing Okla. Stat. tit. 21, §§ 42, 1123(A)(1)). The court of appeals rejected the defendant's argument that only an offense involving an actual minor could trigger the enhancement, reasoning that "§ 2252A(b)(1) does not required aggravated sexual abuse or sexual abuse of a minor." *Id.* at 350. Rather, "[r]ead in context, the phrase 'involving a minor' modifies only 'abusive conduct.'" *Id.*

c. In *Mateen*, the en banc Sixth Circuit held that the defendant's prior conviction for gross sexual imposition under Ohio law did not need to involve a minor to qualify as a § 2252(b)(2) predicate. 764 F.3d at 628–29. The

statute under which the defendant had been convicted, Ohio Rev. Code § 2907.05, contained several subsections, some of which required that the victim be a minor and some of which did not. However, no documents judicially noticeable under *Shepard* established the subsection to which the defendant had pleaded or the victim's age. 764 F.3d at 629–30; *see also United States v. Mateen*, 739 F.3d 300, 307–08 (6th Cir. 2014) (vacated panel opinion). Nonetheless, the court of appeals held that the defendant's prior conviction could qualify if it "relat[ed] to" "aggravated sexual abuse" or "sexual abuse," regardless of the victim's age, and remanded for the district court to make that determination. 764 F.3d at 633.

d. Finally, in *Sinerius*, the Ninth Circuit upheld application of the enhancement on the basis of the defendant's prior conviction for sexual assault under Montana law without taking into account whether the victim was a minor. 504 F.3d at 744 ("Since we conclude that [the defendant's] prior Montana conviction categorically qualifies as 'sexual abuse' for purposes of § 2252A(b), we need not consider whether the conviction would also qualify as 'aggravated sexual abuse' or 'sexual abuse involving a minor' under the same provision."). To be sure, the defendant acknowledged that his victim had been a minor, 504 F.3d at 739 n.2. But the elements of his Montana prior offense require a minor victim. *Id.* at 741 (citing Mont. Code Ann. § 45-5-502). And the Ninth Circuit clarified that its holding was based solely on the categorical match between § 45-5-502 and the generic federal offense of sexual abuse.

504 F.3d at 744 (in light of categorical holding, it was not "necessary that we examine [the defendant's] conviction under the 'modified' categorical approach"). *See also, e.g., United States v. Wiles*, 642 F.3d 1198, 1202 (9th Cir. 2011) (concluding, without mention of victim's age, that prior conviction for attempted sexual assault under same provision of Montana law at issue in *Sinerius* related to "sexual abuse").

2. **The Eighth Circuit:** In stark contrast, a consistent line of Eighth Circuit decisions indicates that any prior state conviction must, to trigger the enhancement, involve a minor victim. *See, e.g., United States v. Linngren*, 652 F.3d 868, 870 (8th Cir. 2011) (Minnesota criminal sexual conduct statute was categorically "overinclusive," with respect to § 2252(b)(1) predicates, "because it includes acts committed ... against non-minors."); *United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007) (noting that elements of defendant's prior Minnesota incest convictions did not establish that victims were minors and thus looking beyond elements to underlying facts to determine whether enhancement applied); *United States v. Weis*, 487 F.3d 1148, 1152 (8th Cir. 2007) (where victim's age was not element of defendant's prior Iowa conviction for assault with intent to commit sexual abuse, court applied enhancement only after consulting charging document, which established that victim was minor); *United States v. Trogdon*, 339 F.3d 620, 621 (8th Cir. 2003) (where victim's age was not element of defendant's prior Missouri conviction for sexual misconduct, court had to examine underlying

facts to determine whether victim was minor, such that enhancement applied).[4]

a. The clearest and most recent example is *Linngren*. There, the defendant's prior conviction was for fifth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.3451, subdivision 1. 652 F.3d at 870. The Eighth Circuit concluded that the statute was categorically "overinclusive" because it "does not require that the victim be a minor." *Id.* Because one could violate the statute "in ways that would not constitute sexual abuse, that is, the 'physical or nonphysical misuse of a minor for a purpose associated with sexual gratification,'" that statute was not a categorical match. *Id.* (quoting *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009)). Thus, "the statute is overinclusive because it includes acts committed ... against non-minors." *Id.* Only because the complaint indicated that the victim was in fact a minor did the enhancement apply. *Id.* at 871.

Hunter, *Weis*, and *Trogdon* are in accord. In each, the Eighth Circuit refused to apply a sentencing enhancement on the basis of a prior conviction that did not include as an element the victim's age without first establishing through other means that the victim was in fact a minor. In *Hunter*, the court

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[4] A district court in the First Circuit has taken the same approach. *United States v. Roy*, 114 F. Supp. 2d 1, 1–2 (D. Me. 2000) (prior conviction for unlawful sexual contact under Maine law did not trigger § 2252A(b)(2) enhancement because "neither the judgment following the defendant's guilty plea nor the criminal complaint on which it is based reveals the victim's age and, under the Maine statute of conviction, age of the victim is not a factor").

relied on the defendant's assent to the factual allegation in his PSR that his prior incest convictions involved minors. 505 F.3d at 831. In *Weis*, the court relied on the trial information to which the defendant pleaded guilty to confirm that his conviction for assault with intent to commit sexual abuse involved a minor. 487 F.3d at 1152. And in *Trogdon*, the court once more relied on the information to which the defendant pleaded guilty to establish that the victim of his sexual misconduct conviction was a minor. 339 F.3d at 621. In each case, establishing the victim's minor status was necessary to upholding the application of the enhancement.

b. Below, the court of appeals brushed off *Hunter* with the observation that the Eighth Circuit had adopted the requirement that a predicate involve a minor "without elaborating on [its] reasoning," App. 15, and the Second Circuit declined to follow such "unexplored assumptions." App. 16. Granted, the Eighth Circuit has not articulated the reasons for its interpretation of the enhancement provisions. But it has adhered, without exception, to the position that a predicate must involve a minor in multiple published decisions over more than a decade. And there is no doubt that had he been sentenced in the Eighth Circuit, petitioner would not have been subject to § 2252(b)(2)'s ten-year mandatory minimum. A principal function of this Court's certiorari jurisdiction is "to secure uniformity in the application" of federal law. *Clay v. United States*, 537 U.S. 522, 526 (2003). Thus, even though the Eighth Circuit has not articulated its reasoning, the divergence

between the Eighth Circuit and other circuits on the question presented breeds intolerable conflict and disparate penalties for similarly situated defendants.

Further percolation is unnecessary. The Eighth Circuit has adhered to its interpretation of the penalty provisions notwithstanding contrary decisions from other courts of appeals—most recently in *Linngren*, which postdates *Hubbard*, *Rezin*, and *Sinerius*. Nor does the lopsided nature of the five-to-one split counsel against review. If the Eighth Circuit's interpretation of these statutes is correct, petitioner and many other federal child pornography defendants around the country are being punished much more severely than Congress intended.

3. **The Tenth Circuit**: The Second Circuit described the Tenth Circuit as aligned with the Eighth, i.e., as having "assumed that a prior state-law sexual abuse conviction requires a minor victim." App. 15-16 (citing *McCutchen*, 419 F.3d at 1125). In *McCutchen*, the Tenth Circuit affirmed application of the § 2252(b)(2) enhancement on the basis of a prior conviction for sexual battery under Kansas law, even though the elements of the offense did not include the victim's minor status. *Id.* at 1125-27. The court rejected the defendant's argument that it was limited to considering the statutory elements and, relying on a criminal complaint establishing that the victim was a minor, held the enhancement applicable. *Id.*

As the Second Circuit suggested, *McCutchen* can be read to express the view that a minor victim is required. However, subsequent to *McCutchen*, the Tenth Circuit suggested that the question remains open. *United States v. Becker*, 625 F.3d 1309, 1312 n.3 (10th Cir. 2010). There, after the Fifth Circuit's decision in *Hubbard*, the Tenth Circuit concluded that a prior conviction under Illinois law for indecent solicitation of a child was a qualifying predicate under § 2252(b)(1), even though the defendant solicited an adult undercover agent, not an actual minor. 625 F.3d at 1312–13. That holding embraced *Hubbard*'s point that a defendant who believes he is propositioning a minor has the requisite intent (and thus, the culpability) for a child sexual abuse offense. *Id.* at 1312 (citing *Hubbard*, 480 F.3d at 346). However, the Tenth Circuit did not adopt *Hubbard*'s additional holding that only "abusive sexual conduct" necessitates a minor victim; on the contrary, the Tenth Circuit suggested that it disagreed: "[W]e caution that our opinion today should not be read to endorse the position, also adopted in *Hubbard*, that § 2252(b) 'does not require aggravated sexual abuse or sexual abuse of *a minor*,' and that 'the phrase 'involving a minor' modifies only 'abusive conduct.' This issue—whether the sexual abuse of adults would qualify as a predicate offense under § 2252(b)—is not before us today." 625 F.3d at 1312 n.3 (quoting *Hubbard*, 480 F.3d at 350 (emphasis by the Tenth Circuit)).

In short, while the Tenth Circuit's position appears unsettled, the question presented implicates an acknowledged split between the Second,

Fourth, Fifth, Sixth, and Ninth Circuits on the one hand, and the Eighth Circuit on the other. That five-to-one division merits this Court's intervention.

B. This case is an ideal vehicle and the question is important.

1. This case offers an ideal vehicle for resolving the question presented. In the district court, petitioner objected that his prior New York State conviction did not trigger § 2252(b)(2)'s ten-year mandatory minimum term because the offense involved an adult victim only. App. 22–23. Absent the mandatory minimum, petitioner faced a Guidelines range of 78–97 months, and the district court said nothing to suggest that it would have imposed a 120-month sentence had § 2252(b)(2) not required it. In his plea agreement, petitioner expressly reserved the right to appeal this question, as respondent acknowledged in the court of appeals. App. 6 n.2. Petitioner raised the question presented in the court of appeals, which issued a reasoned published decision, and he sought en banc review.

Moreover, the undisputed nature of petitioner's prior conviction facilitates this Court's review of the question presented. The courts of appeals have taken slightly different approaches to ascertaining the nature of a defendant's prior conviction. For example, the Second and Fourth Circuits have applied the categorical and modified categorical approaches. *See United States v. Beardsley*, 691 F.3d 252, 258 (2d Cir. 2012); *Spence*, 661 F.3d at 199. The Eighth Circuit has adopted a broader inquiry, which "looks to the statute

under which a defendant was previously convicted and then to the facts underlying the offense to determine whether a prior conviction triggers the enhanced penalties." *Weis*, 487 F.3d at 1151 (citing *Trogdon*, 339 F.3d at 621). So has the Tenth Circuit. *McCutchen*, 419 F.3d at 1127 (Congress intended "to allow a sentencing court to look beyond the mere elements of a prior state conviction" in determining applicability of enhancement).

This Court need not wade into that debate (which would benefit from further percolation in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013)), to resolve the question presented here. The elements and the underlying facts of petitioner's prior New York conviction align. Section 130.65(1) of New York's Penal Law does not refer to the victim's age at all. And it is undisputed that the victim was petitioner's 53-year-old girlfriend. Whether one considers elements, *Shepard*-approved documents, or the underlying facts is immaterial. Petitioner's prior conviction involved an adult. Likewise, this case does not present the complication of an adult undercover law enforcement officer pretending to be a minor. *Cf. Becker*, 625 F.3d at 1312–13; *Hubbard*, 480 F.3d at 346. Rather, the victim was, and was known to be, an adult. This petition thus offers a clean opportunity to resolve a straightforward question of statutory interpretation.

2. The question presented is important. About 2,000 defendants were prosecuted in the United States for child pornography offenses in fiscal year 2013. U.S. Sent'g Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*

tbl.13, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table13.pdf. Child pornography defendants, as a group, already receive some of the most severe sentences in the federal criminal justice system. *See id.* (mean sentence of 136 months, longer than all offense categories other than murder, kidnapping, and sexual abuse). The enhancements at issue here have dramatic consequences, increasing mandatory minimum sentences by ten years for all applicable offenses and setting some of the harshest mandatory minimums in title 18 of the U.S. Code. *See, e.g.*, 18 U.S.C. § 2251(e) (increasing mandatory minimum for production of child pornography from 15 to 25 years). Fairness requires the correct and uniform application of such stiff penalties.

C. The decision below is wrong.

This Court should also grant review because the Second Circuit's decision is wrong. The court mistakenly rejected application of the series qualifier canon, which, this Court reiterated as recently as last Term, can overcome the rule of last antecedent "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last." *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) (quoting *Porto Rico Rwy., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)). The court of appeals justified its departure from the most natural reading of the statutory text on the ground that it would be "unreasonable" to attribute to Congress

the intent to treat predicate conduct differently according to whether it constituted a federal or state offense. But Congress did just that elsewhere in these very statutes, evincing a clear intent to limit state-law predicates to offenses against children. Finally, the court of appeals erroneously dismissed legislative history confirming that Congress meant to provide enhanced penalties for defendants with prior convictions under "*State child abuse law[s].*" S. Rep. No. 104-358, 104th Cong., 1996 WL 506545, at *9 (1996) (emphasis added).

1. This Court interprets criminal statutes, like all statutes, according to their plain language and ordinary English usage. *See, e.g., Flores-Figueroa v. United States*, 556 U.S. 646, 650–652 (2009). The plain meaning of the phrase "a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" is that the final phrase, "involving a minor or ward," modifies all three classes of state-law predicates. That reading represents a straightforward application of the series qualifier canon, which directs that a modifying phrase following a "single, integrated list" applies to all elements of the list. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 345 n.4 (2005). *See also, e.g., United States v. Bass*, 404 U.S. 336, 339–40 (1971). For example, in *Bass*, this Court considered a criminal statute that applied to "any person ... who receives, possesses, or transports in commerce or affecting commerce ... any firearm." *Id.* at 337 (quoting former 18 U.S.C. § 1202(a)).

Applying the series qualifier canon, the Court determined that the "'the natural construction of the language' suggests that the clause 'in commerce or affecting commerce' qualifies all three antecedents in the list." *Id.* at 339 (quoting *Mor*, 253 U.S. at 348). That was true, the Court reasoned, because "'in commerce or affecting commerce' undeniably applies to at least one antecedent, and ... makes sense with all three," such that "the more plausible construction here is that it in fact applies to all three." *Id.* at 339–40.

Just last Term, the Court reaffirmed that the series qualifier canon may overcome the rule of last antecedent. *Paroline*, 134 S. Ct. at 1720–21. There, the Court considered 18 U.S.C. § 2259(b)(3), which enumerates categories of losses for which restitution is payable to victims of child pornography offenses. *See* 134 S. Ct. at 1720 ("The statute enumerates six categories of covered losses. These include certain medical services, § 2259(b)(3)(A); physical and occupational therapy, § 2259(b)(3)(B); transportation, temporary housing, and child care, § 2259(b)(3)(C); lost income, § 2259(b)(3)(D); attorney's fees and costs, § 2259(b)(3)(E); and a final catchall category for 'any other losses suffered by the victim as a proximate result of the offense,' § 2259(b)(3)(F)."). The Court rejected the victim's argument, based on the rule of last antecedent, that the clause "as a proximate result of the offense" modified only the last enumerated category, § 2259(b)(3)(F), in which it appeared. 134 S. Ct. at 1720–21. Cautioning that the rule of last antecedent is "not an absolute and can assuredly be overcome

by other indicia of meaning," *id.* at 1721 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)), the Court instead applied the series qualifier canon. The "proximate result" clause modified all the enumerated categories of loss because "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 1721 (quoting *Mor*, 253 U.S. at 348).

The argument for applying the series qualifier canon here is even stronger. In *Paroline*, the elements of the list appeared in separate statutory subparagraphs, § 2259(b)(3)(A)–(E), with the modifying clause in the last subparagraph, § 2259(b)(3)(F). Here, the elements ("aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct") are not separated in that way. And they are related both linguistically and substantively, all dealing with different forms of the same crime, child abuse. The modifying clause "undeniably applies to at least one antecedent" and "makes sense with all three." *Bass*, 404 U.S. at 339–40.

2. The decision below also determined that it would be "unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law." App. 14 (quoting *Spence*, 661 F.3d at 197). Other courts on the long side of the split have made the same point. *See, e.g.*, *Mateen*, 764 F.3d at 631–32; *Hubbard*, 480 F.3d at 350; *Rezin*, 322

F.3d at 448. These decisions fail to recognize that Congress unquestionably intended this very result—that the scope of federal convictions triggering the enhancement would be far broader than the scope of state convictions that do so—and that whether a particular federal conviction is a qualifying predicate says nothing about whether an analogous state law conviction is. Indeed, while the state predicates all involve sexual abuse or child pornography, many federal predicates involve neither, and consequently a defendant may in many cases face the enhancement for a federal conviction but not for a state conviction encompassing the same conduct. *See, e.g.*, 18 U.S.C. §§ 1461–64 (in Chapter 71) (possessing, mailing, transporting, and broadcasting obscene matter); § 1468 (in Chapter 71) (distributing obscene material by cable or subscription television); § 2257 (in Chapter 110) (failing to maintain records for adult pornography); § 2258 (in Chapter 110) (failing to report child abuse, including non-sexual child abuse).

It is also apparent that Congress carefully limited qualifying state offenses to crimes against children, even where an analogous federal crime against adults would be a predicate. For example, §§ 2252(b)(1) and 2252A(b)(1) enhance a defendant's sentencing range if he has a prior conviction under 18 U.S.C. § 1591, a federal sex trafficking statute applicable to adult and minor victims. But §§ 2252(b)(1) and 2252A(b)(1) limit qualifying state predicates to "sex trafficking of children." *See also, e.g.*, § 2251(e) (treating federal offense of sexual exploitation of adults or minors, § 2422 in

Chapter 117, as predicate, but restricting state predicates to those involving "sexual exploitation of children"). In short, there is nothing anomalous about the differential treatment of federal and state offenses that the Eighth Circuit's rule produces. On the contrary, such differential treatment is an unmistakable and intended feature of the penalty provisions.

3. Finally, the court of appeals dismissed without analysis legislative history reflecting that Congress did intend qualifying state-law predicates to be limited to offenses against children. App. 18. The Senate Report on the Child Pornography Prevention Act of 1995, which added the penalty provisions of §§ 2252 and 2252A at issue here, specified that the new enhancements would apply to "a repeat offender with a prior conviction under chapter 109A or 110 of title 18, or under any *State child abuse law* or law relating to the production, receipt or distribution of child pornography." S. Rep. No. 104-358, 104th Cong., 1996 WL 506545, at *9 (1996) (emphasis added).

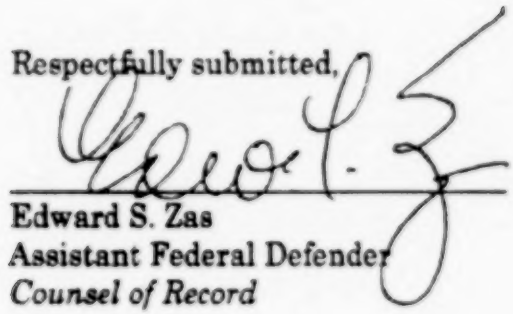
* * *

In summary, this Court's intervention is needed to resolve the existing circuit split and to correct the Second Circuit's mistaken interpretation of the statute.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

13-602
United States v. Lockhart

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2013

(Argued: January 14, 2014 Decided: May 15, 2014)

Docket No. 13-602-cr

UNITED STATES OF AMERICA,

Appellee,

—v.—

AVONDALE LOCKHART,

Defendant-Appellant.

Before:

KATZMANN, *Chief Judge*, STRAUB and LOHIER, *Circuit Judges*.

Defendant-Appellant Avondale Lockhart appeals from a judgment of conviction and sentence entered by the United States District Court for the Eastern District of New York (Johnson, *J.*), in which the district court applied the sentencing enhancement set forth in 18 U.S.C. § 2252(b)(2), which requires a minimum term of imprisonment of ten years. That enhancement applies when a defendant is found guilty of possessing child pornography and was previously convicted under state law of a crime "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." Because we find that § 2252(b)(2) does not require that a prior state-law aggravated sexual abuse or sexual abuse conviction involve a minor, the judgment of the district court is **AFFIRMED**.

PATRICK S. SINCLAIR (Maria Cruz Melendez and David C. James, *on the brief*), Assistant United States Attorneys, for Loretta E. Lynch, United States Attorney for the Eastern District of New York, Brooklyn, NY, *for Appellee*.

DAVID A. LEWIS, Assistant Federal Public Defender, Federal Defenders of New York, New York, NY, *for Defendant-Appellant*.

KATZMANN, *Chief Judge*:

In this case, we must decide whether a sentencing provision that provides for a ten-year mandatory minimum term of imprisonment if a defendant was previously convicted "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," 18 U.S.C. § 2252(b)(2), requires that an "aggravated sexual abuse" or "sexual abuse" conviction involve a minor or ward, or whether only "abusive sexual conduct" is modified by the phrase "involving a minor or ward," such that a sexual abuse conviction involving an adult victim constitutes a predicate offense. We conclude that the statutory text and structure indicate that the latter reading is correct and therefore affirm the district court's imposition of a ten-year sentence on Defendant-Appellant Avondale Lockhart.

BACKGROUND

In June 2010, after receiving information indicating that Lockhart had transferred money to a distributor of child pornography, federal agents initiated an undercover operation, in which they solicited Lockhart to purchase videos portraying child pornography from an agent-run service. Lockhart requested a number of videos from the agents, and on July 13, 2010, after obtaining a search warrant, the agents conducted a controlled delivery of the package ostensibly containing the videos Lockhart had ordered. Once Lockhart accepted the package, the agents executed the search warrant and seized Lockhart's laptop and external hard drive, which together contained over 15,000 images and at least nine videos depicting child pornography.

As a result of this investigation, Lockhart was indicted on March 24, 2011, on two counts: (1) attempted receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2), based on his attempted purchase of videos containing child pornography from the undercover agents; and (2) possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), based on the images and videos already on his computer and hard drive. On March 6, 2012, pursuant to a plea agreement, Lockhart pleaded guilty to count two of the indictment in the

United States District Court for the Eastern District of New York. Count one of the indictment was thereafter dismissed.

Lockhart had previously been convicted in state court in April 2000 of first degree sexual abuse, in violation of New York Penal Law § 130.65(1). The arrest report from this earlier conviction alleges that Lockhart pinned down his fifty-three-year old girlfriend, ripped off her underpants, and attempted to penetrate her vagina with his penis. Lockhart received a sentence of five years' probation and was classified as a level-one sex offender as a result of this conviction.

The Presentence Report ("PSR") prepared for Lockhart's sentencing calculated a recommended sentencing range of 78–97 months under the U.S. Sentencing Guidelines. However, the PSR adopted the government's position that Lockhart was subject to a mandatory minimum sentence of ten years under 18 U.S.C. § 2252(b)(2), which requires such a term of imprisonment if a person violates § 2252(a)(4) and "has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252(b)(2). The PSR thus recommended an effective range under the Sentencing Guidelines of 120 months due to Lockhart's prior conviction for sexual abuse in the first degree. In his sentencing

submission, Lockhart argued that his prior conviction could not support the imposition of the mandatory minimum sentence because his sexual abuse offense did not involve a minor. The district court rejected Lockhart's position, concluding that the mandatory minimum applied, and imposed a ten-year sentence, to be followed by ten years' supervised release. This appeal followed.

DISCUSSION

As discussed above, Lockhart pleaded guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4) and was sentenced pursuant to § 2252(b)(2). While § 2252(b)(2) generally requires no minimum sentence, in certain circumstances the statute provides for a mandatory minimum sentence of ten years. In its entirety, § 2252(b)(2) provides:

> Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice), or *under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor* or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this

> title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 2252(b)(2) (emphasis added).[1]

Here, the district court found that Lockhart was subject to the mandatory minimum based on his prior state conviction for sexual abuse of an adult woman. On appeal, Lockhart challenges that conclusion, arguing that § 2252(b)(2)'s mandatory minimum does not apply if the victim of the prior sexual abuse offense is an adult, rather than a minor. Thus, the sole issue on appeal is whether the phrase "involving a minor or ward" modifies an entire category of state-law crimes—those "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct"—or whether "involving a minor or ward" modifies only its immediately preceding antecedent, "abusive sexual conduct." "We review de novo all questions of law relating to the district court's application of a federal sentence enhancement." *United States v. Beardsley*, 691 F.3d 252, 257 (2d Cir. 2012).[2]

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[1] Language identical or similar to the key phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" is used in four other sentencing provisions in Chapter 110 of Title 18 of the United States Code. *See* 18 U.S.C. §§ 2251(e) (referring to "abusive sexual contact," rather than "conduct"), 2252(b)(1), 2252A(b)(1), 2252A(b)(2).

[2] As part of his plea agreement, Lockhart waived his right to appeal his sentence but excluded from that waiver the issue now before the Court. On March 26, 2013, the

In interpreting § 2252(b)(2), "[w]e start, as we must, with the language of the statute," giving the statutory terms their "'ordinary or natural' meaning." *Bailey v. United States*, 516 U.S. 137, 144–45 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)), *superseded by statute on other grounds*, Pub. L. No. 105-386, 112 Stat. 3469 (1998) (codified as amended at 18 U.S.C. § 924(c)). Where, as here, the plain meaning is not pellucid, we can draw upon a variety of interpretive tools, including canons, statutory structure, and legislative history, to discern meaning. As to canons, we first consider which rule of statutory construction should inform our understanding of the phrase "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor": the last antecedent rule or the series qualifier canon.

"Under the last antecedent rule, 'a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *United States v. Kerley*, 416 F.3d 176, 180 (2d Cir. 2005) (ellipsis omitted) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). Although the "rule is not an absolute and can assuredly be overcome by other indicia of meaning," the last

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government filed a motion to dismiss Lockhart's appeal based on this waiver. However, on July 8, 2013, the government moved to withdraw its motion to dismiss, acknowledging that the instant issue fell outside the scope of the appeal waiver. The Court granted the government's motion to withdraw its prior motion on July 9, 2013. Therefore, waiver is not at issue, and we proceed to the merits of Lockhart's claim.

antecedent rule generally applies absent a contrary indication of meaning. *Barnhart*, 540 U.S. at 26 (citing 2A N. Singer, *Sutherland on Statutory Construction* § 47.33 at 369 (6th rev. ed. 2000)). Relying on this presumption, the government contends that, as the district court concluded, the phrase "involving a minor or ward" modifies only "abusive sexual conduct," and therefore Lockhart's prior state conviction for sexual abuse triggers the imposition of § 2252(b)(2)'s ten-year mandatory minimum sentence, regardless of the fact that the victim of his prior offense was an adult.

Lockhart argues in favor of the application of the contrary series qualifier canon of statutory construction, which "provides that a modifier at the beginning or end of a series of terms modifies all the terms." *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012). The series qualifier canon applies where "[t]he modifying clause appear[s] . . . at the end of a single, integrated list," *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 344 n.4 (2005), and where the modifying clause "undeniably applies to at least one antecedent, and . . . makes sense with all," *United States v. Bass*, 404 U.S. 336, 339–40 (1971). Lockhart contends that this canon should be applied, as the phrase "involving a minor"

appears at the end of the integrated list of three antecedents, all of which would "make[] sense" if limited by this modifying clause.

Lockhart and the government put forth various arguments to support reliance on their preferred canons. We are not fully persuaded that either canon applies unambiguously based on the language and structure of this statutory phrase alone. For example, while Lockhart is correct that the modifying clause "involving a minor" appears at the end of this particular list of state-law crimes, this is not the prototypical situation in which the series qualifier canon is applied, since the list itself falls in the middle of a longer list of qualifying predicate crimes; that is, the modifier does not end the list in its entirety. *Cf. Bass*, 404 U.S. at 337 (applying the series qualifier rule to the phrase "receives, possesses, or transports in commerce or affecting commerce" where that series provided the sole list of conduct prohibited by the statute). On the other hand, the inclusion of the word "or" before "abusive sexual conduct" and then again before "the production . . . of child pornography" in the immediately following clause suggests that the state sexual abuse crimes are set off as a separate list within the larger list, lending some support to Lockhart's preferred reading.[3]

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[3] Although we do not deem this dispositive on its own, we note that 18 U.S.C. § 2251(e)'s similar language differs from that used in § 2252(b)(2) in a manner that sheds

We are not persuaded by Lockhart's position that the three types of state sexual abuse offenses constitute a related "continuum of conduct," each element of which should be modified by the phrase "involving a minor" to maintain a common limitation on the entire continuum. Br. for Def.-Appellant at 20. Such a reading would eliminate any distinction between "sexual abuse involving a minor" and "abusive sexual conduct involving a minor," since "abusive sexual conduct involving a minor" seemingly would encompass anything that constitutes "sexual abuse involving a minor," as well as, for example, other sexual conduct that may be criminalized only when the victim is a child. *See, e.g.*, *United States v. Hubbard*, 480 F.3d 341 (5th Cir. 2007) (finding a conviction for "soliciting sex from a person the Defendant believed to be under sixteen" to constitute a conviction relating to "abusive sexual conduct involving a minor"). Thus, Lockhart's proposed reading may run up against the principle of statutory

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some light on the present dispute. Specifically, § 2251(e) imposes a heightened sentence on defendants convicted of prior crimes "under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production . . . of child pornography." In this context, aggravated sexual abuse, sexual abuse, and abusive sexual conduct do not form their own separate list ending in a common modifier; rather, "abusive sexual contact involving a minor or ward" is the third element of a four-element list ending in "sex trafficking of children." We assume that Congress intended § 2251(e)'s similar language to be read in tandem with § 2252(b)(2). Thus, the addition of a fourth element in § 2251(e) after the modifier suggests that the series qualifier canon should not be applied.

interpretation that "[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Bailey*, 516 U.S. at 146.

At the same time, neither are we convinced by the government's contention that the fact that there is no comma separating "abusive sexual conduct" from the modifier "involving a minor or ward" itself proves that "involving a minor or ward" should be read together with "abusive sexual conduct," but not with "aggravated sexual abuse" or "sexual abuse." We have previously acknowledged that "[o]ne of the methods by which a writer indicates whether a modifier that follows a list of nouns or phrases is intended to modify the entire list, or only the immediate antecedent, is by punctuation—specifically by whether the list is separated from the subsequent modifier by a comma." *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781–82 (2d Cir. 2013). However, while a comma may be a helpful aid to statutory interpretation, inclusion of such a comma is not a hard-and-fast rule of grammar. *See Bass*, 404 U.S. at 340 n.6 ("[M]any leading grammarians, while sometimes noting that commas at the end of series can avoid ambiguity, concede that use of such commas is discretionary."). Here, inserting a comma before "involving a minor or ward"

might confuse rather than clarify the meaning of this provision because, as discussed above, the relevant series of state sexual abuse offenses is separated only by a comma from a continuing list of state child pornography offenses. In this case, then, adding a comma before "involving a minor or ward" might make the modifying clause appear to be a separate element in a longer list and would, in any case, be grammatically unnecessary. Accordingly, here, basing our analysis "only on punctuation is necessarily incomplete and runs the risk of distorting [the] statute's true meaning." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). While the lack of a separating comma may run contrary to Lockhart's interpretation, it is not dispositive of our reading of § 2252(b)(2). *See United States v. Rezin*, 322 F.3d 443, 448 (7th Cir. 2003).

Ultimately, we cannot definitively determine by applying the canons whether the phrase "involving a minor or ward" modifies the entire category of state-law sexual abuse crimes or only "abusive sexual conduct." While the government's reading appears to have greater support in the relevant clause, lingering ambiguity prevents us from concluding on this basis alone that the government's interpretation is the correct one. However, this ambiguity does not end our inquiry into the meaning of the statutory text. Rather, it is well

established that statutory phrases should not be construed "in isolation; we read statutes as a whole." *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)).

Accordingly, we look to the remainder of § 2252(b)(2) and consider whether its overall scheme may shed light on what state-law sexual abuse offenses Congress intended to include as predicate offenses for imposition of the mandatory minimum sentence. In addition to imposing a ten-year term of imprisonment for predicate violations of state law, § 2252(b)(2) also provides for such a sentence if the defendant has a prior conviction under federal law for a violation under "[chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice)." The referenced statutes prohibit sexual conduct, including conduct that may have both minor and adult victims. *See* 18 U.S.C. §§ 1460–1470 (Chapter 71, offenses relating to obscene matter, materials or language); 18 U.S.C. §§ 2241–2248 (Chapter 109A, sexual abuse of adults or minors); 18 U.S.C. §§ 2251–2260A (Chapter 110, sexual exploitation and other abuse of minors); 18 U.S.C. §§ 2421–2428 (Chapter 117, transportation of adults or minors for illegal sexual activity and related crimes); 10 U.S.C. § 920 (rape and sexual assault under the Uniform

Code of Military Justice). Importantly, § 2252(b)(2) does not specify that a conviction under a federal statute must involve a minor; a violation of any of these statutory provisions constitutes a predicate offense for the application of § 2252(b)(2)'s mandatory minimum sentence, regardless of the age of the victim.

Looking at § 2252(b)(2) as a whole, we find, as a number of other circuits have explained, that "it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law." *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011); *see also Hubbard*, 480 F.3d at 350 ("Read in context, the phrase 'involving a minor' modifies only 'abusive conduct.' We are persuaded this was the intent of Congress, not simply because of the placement of the phrase 'involving a minor,' but because the enumeration of prior federal offenses that will also give rise to a mandatory minimum sentence expressly includes sexual abuse of adults or minors."); *Rezin*, 322 F.3d at 448 ("[I]t would have been strange had Congress on the one hand authorized heavier punishment for offenders who had a prior *federal* conviction for a sexual crime whether or not it involved a minor, and on the other hand insisted that if the prior conviction had been for a state offense, even one identical to one of the

enumerated federal offenses, the victim had to be a minor."); *cf. United States v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007) (assuming, without analysis, that "the terms 'aggravated sexual abuse,' 'sexual abuse,' and 'abusive sexual conduct involving a minor' under § 2252A(b)" set forth distinct offenses); *United States v. West*, 333 F. App'x 494 (11th Cir. 2009) (per curiam) (holding that it was not plain error to apply the mandatory minimum to a prior conviction where the state law at issue did not always require an actual minor victim). This reasoning compels us to conclude that "involving a minor or ward" modifies only prior state convictions for "abusive sexual conduct," not those for "sexual abuse" or "aggravated sexual abuse," each of which would constitute a predicate *federal* offense if committed against an adult or a child.

We acknowledge that the Sixth, Eighth and Tenth Circuits have reached the opposite conclusion, namely, that the phrase "involving a minor or ward" modifies all three categories of state sexual abuse crimes. However, the Eighth and Tenth Circuits have drawn this conclusion without elaborating on their reasoning. Indeed, these circuits appear merely to have assumed that a prior state-law sexual abuse conviction requires a minor victim for purposes of the sentencing enhancement, an assumption that made little difference in those cases

since the predicate violations at issue involved minor victims. *See United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007) (relying on this assumption); *United States v. McCutchen*, 419 F.3d 1122, 1125 (10th Cir. 2005) (considering whether "the statute under which [a] prior state conviction arose must have included as an element the victim's status as a minor" for the conviction to fall within the scope of any of the three categories in § 2252(b)(2)). The Sixth Circuit has reached this conclusion most explicitly, although it did so because it found that another panel of that court had "already considered the proper construction of the statutory language at issue," and that that prior decision bound the current panel, even though the earlier opinion did not engage in any express analysis of the statutory language. *United States v. Mateen*, 739 F.3d 300, 304–05 (6th Cir. 2014) (citing *United States v. Gardner*, 649 F.3d 437 (6th Cir. 2011)), *reh'g en banc granted, opinion vacated* (Apr. 9, 2014). We are not compelled to follow such unexplored assumptions in coming to our conclusion here.[4]

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[4] In *United States v. Beardsley*, 691 F.3d 252 (2d Cir. 2012), this Court commented that for a state-law conviction to trigger the analogous sentencing enhancement under 18 U.S.C. § 2252A(b)(1), "the statute underlying the prior conviction must itself relate to sexual abuse of minors for the enhancement to apply." *Id.* at 269. However, this statement is dictum and does not bind this panel. At issue in *Beardsley* was whether to take a categorical approach in determining whether a state-law conviction for endangering the welfare of a child was a predicate offense under § 2252A(b)(1) sentencing enhancement. Beardsley's actual conduct underlying the conviction constituted "abusive sexual

Resisting the conclusion that Congress intended to treat state and federal predicate crimes similarly, Lockhart argues that the relevant pattern in § 2252(b)(2) is instead that Congress limited other state-law predicate offenses in this and related sentencing provisions to those involving children. *See, e.g.*, 18 U.S.C. § 2252(b)(2) (including state offenses relating to "child pornography"); 18 U.S.C. § 2251(e) (including state offenses relating to "sex trafficking of children"). According to Lockhart, then, not reading "aggravated sexual abuse" and "sexual abuse" to be limited to those convictions "involving a minor or ward" would create an inconsistency among the treatment of different state-law offenses. While there is some logic to this position, we do not think that this theory is more reasonable than the assumption that Congress would intend for courts to treat prior sexual abuse convictions similarly, regardless of whether the conviction was under federal or state law. Lockhart's interpretation is further undermined when one compares the language used to describe the universe of state sexual

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conduct involving a minor," so that case turned on the scope of the conduct prohibited by the statute, not whether the conviction must involve a minor. *See id.* at 256. This understanding of *Beardsley* was confirmed in a recent decision of this Court, in which we stated that "[w]e did not expressly identify in *Beardsley* that the three types of predicate offenses are distinct, nor did we address whether the phrase 'involving a minor or ward' modifies only 'abusive sexual conduct' as other Courts of Appeals have done." *United States v. Barker*, 723 F.3d 315, 322 (2d Cir. 2013) (per curiam). Thus, we are not bound by *Beardsley*'s suggestion that "involving a minor" modifies each term.

abuse convictions in § 2252(b)(2) with the federal analogs in 18 U.S.C. §§ 2241 (aggravated sexual abuse), 2242 (sexual abuse), and 2243 (sexual abuse of a minor or ward). Under the federal statutory scheme, adult and minor victims are included under the first two provisions, while § 2243 covers only minors and wards. Although the language used in § 2252(b)(2) is not identical to these statutory titles, it nonetheless suggests that Congress intended to impart a similar structure to state-law predicate offenses for purposes of this sentencing enhancement, and the pattern Lockhart perceives among other state-law offenses does not necessarily apply here.

We furthermore note that the brief legislative history of this provision does not alter our conclusion. *See* S. Rep. No. 104-358, 104th Cong., 1996 WL 506545, at *9 (1996) (stating only that the penalties under §§ 2252 and 2252A would provide for a mandatory minimum sentence for "a repeat offender with a prior conviction under chapter 109A or 110 of title 18, or under any State child abuse law or law relating to the production, receipt or distribution of child pornography"). Likewise, resort to the rule of lenity is inappropriate where, as here, "the statutory text allows us to make far more than 'a guess as to what

Congress intended.'" *DePierre v. United States*, 131 S. Ct. 2225, 2237 (2011) (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995)).

Accordingly, because we conclude that "involving a minor or ward" modifies only "abusive sexual conduct" and not "sexual abuse" or "aggravated sexual abuse," we find that the district court correctly applied § 2252(b)(2)'s sentencing enhancement in light of Lockhart's prior conviction for sexual abuse.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the district court are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of October, two thousand fourteen,

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United States of America,

Appellee,

v.

Avondale Lockhart,

Defendant - Appellant.

ORDER
Docket No.: 13-602

Appellant Avondale Lockhart filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA, :
:
Plaintiff, : 11-CR-231
:
-against- : United States Courthouse
: Brooklyn, New York
AVONDALE LOCKHART, :
:
Defendant. : February 1, 2013
: 9:30 a.m.
- - - - - - - - - - - - - - - X

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE STERLING JOHNSON, JR.
UNITED STATES DISTRICT SENIOR JUDGE

APPEARANCES:

For the Plaintiff: LORETTA E. LYNCH, ESQ.
United States Attorney
BY: MARIA CRUZ MELENDEZ, ESQ.
Assistant United States Attorney

For the Defendant: FEDERAL DEFENDERS
BY: MILDRED WHALEN, ESQ.

Probation: MARY ANN BETTS

Court Reporter: FREDERICK R. GUERINO, C.S.R.
225 Cadman Plaza East
Brooklyn, New York
(781) 613-2503

Proceedings recorded by mechanical stenography, transcript produced by CAT.

THE COURT CLERK: United States of America v. Lockhart.

THE COURT: Note your appearances.

MS. MELENDEZ: Good morning, your Honor.

Maria Cruz Melendez for the government. With me here from the Probation Department is Mary Ann Betts.

MS. BETTS: Good morning, your Honor.

MS. WHALEN: Good morning, your Honor.

Federal Defenders of New York by Mildred Whalen for Mr. Lockhart.

THE COURT: Mr. Lockhart, have you read and discussed the presentence report with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Are you ready for sentence?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Let me address some of the legal matters that have been presented to me by the lawyers.

First order of business, let the record reflect that I am in possession of a transcript of a plea by this defendant before Magistrate Judge Go on March 6, 2012, and I accept the plea.

Secondly, I like to state I adopt the finding in the presentence report made by the Probation Department.

One of the main objections by the defendant is the issue of the mandatory minimum that the government says is

applicable in this situation, and Ms. Whalen, as usual, is a good lawyer and puts in some very, very good papers. You state or she states, basically, that 18 2252(b)(2) is inapplicable because she states that defendant did not have sexual conduct involving a minor; is that correct?

MS. WHALEN: The prior conviction is not for sexual conduct involving a minor.

THE COURT: And I'm ruling that the plain reading of the statute negates that particular position. The defendant was convicted in state court. When was it, 2000 --.

MS. MELENDEZ: 1999, your Honor.

THE COURT: In 1999, and the situation was where he pinned down a former girlfriend and attempted to place his penis in her vagina. He was convicted of that and received five years probation. That fits within that part of the statute that speaks of a state conviction for aggravated sexual abuse.

Secondly, there is an Eighth Amendment claim.

MS. WHALEN: Yes, Your Honor.

THE COURT: And I will deny that because I think that the statute created by Congress has a legitimate purpose, and it's not unconstitutional.

The guideline range in this particular case is 78 to 97 months. The maximum statute calls for 240 months, but the mandatory minimum, which is triggered by the aggravated

sexual abuse after a conviction, is 120 months, which is below the 240 months.

I think, thirdly, Ms. Whalen raises the issue of United States v. Dorvee. This is a different kettle of fish. In Dorvee, the court referred to a situation where the enhancement created a situation where the sentence was greater than the mandatory minimum. In this situation, there is no exceeding the mandatory minimum, therefore, I hold that Dorvee does not apply.

Now, any other objection, Ms. Whalen?

MS. WHALEN: No, Your Honor.

THE COURT: Now, do you agree with the guideline range?

MS. WHALEN: Your Honor, I object to the guideline range as set forth.

THE COURT: I understand that and that's on the record.

MS. WHALEN: But given the court's analysis, I understand that the applicable guideline range would be 120 months.

THE COURT: Okay. Now I will ask Mr. Lockhart, do you wish to say something?

THE DEFENDANT: I just want to say I'm sorry for what I did. I didn't mean to hurt anyone. I was recovering from my kidney transplant and I bought a computer, my first

computer, and I ended up on one of those sites. I'm sorry.

THE COURT: Okay. Ms. Whalen?

MS. WHALEN: Your Honor, I think that the mandatory minimum sentence of 120 months would be more than sufficient to achieve the goals of sentencing. I would like to address the medical issues after or I can address them now, if the court wants, in terms of surrender, and my conversations with the Bureau of Prisons about taking care of Mr. Lockhart's medical condition.

THE COURT: Okay. I received something from the government in which -- and maybe -- is it Ms. Melendez?

MS. MELENDEZ: Yes, Your Honor?

THE COURT: I haven't messed your name up yet.

MS. MELENDEZ: Well, technically, your Honor, it is Cruz Melendez, but I answer by Ms. Melendez as well.

THE COURT: Well, I messed it up. Welcome to the club.

Ms. Cruz Melendez sent me a letter. I assume that you got a copy of it. I think it was dated January 17th.

MS. WHALEN: Yes, Your Honor. And when we were last before the court on the 18th, I asked for an opportunity to speak with the Bureau of Prisons about the issue of a lack of a drug called Myfortic which prevents rejection of a transplanted kidney. So Ms. Cruz Melendez provided me Joyce Horikawa's telephone number at the Bureau of Prisons. Ms.

Sullivan actually wrote the letter that is attached to the government's January 17th letter, but she is the regional director, and Ms. Horikawa is above her in terms of the Bureau of Prisons.

So when I talked to Ms. Horikawa, I was talking to her about whether or not we can have an examination, because the doctor in the Bureau of Prisons has to actually prescribe the drugs for Mr. Lockhart. So I was asking if there was a way we could arrange for him to appear at the prison, but not actually be designated until they got his medication. What Ms. Horikawa said is that she said that once we receive notification of Mr. Lockhart's designation - and I think everybody agrees that he should self-surrender - she told me that based on his records, he will be designated to what is called a Category Care Level Three Bureau of Prisons in terms of medicine.

THE COURT: Is that Butner?

MS. WHALEN: Either could be Butner. I think it could be Devins. I think it could be Minnesota. There are a couple of them nationwide. She said that once we were notified of the actual designation, we should then forward a complete set of my client's medical records to her. She would then send them to the regional director.

She also said that given the fact that some of his medication was not on formulary, they would allow him to

bring a seven-day supply of medication. She said that they now had a 36-hour turnaround for non-formulary medication, but a seven-day supply would cover him in case there were any delays. Then we would also provide them with the name and the contact number of his treating physician to get additional information.

She suggested a Monday, not this Monday, but in the future a Monday surrender date.

THE COURT: I'm going to allow him to surrender, and it will probably be a couple of months.

MS. WHALEN: Okay. I think my understanding is designations are usually taking like one to two months. And since we have to give them the additional medical records, I would ask -- we'll have everything ready to go as soon as the designation is made. So maybe like two and a half months and then we can have two weeks afterwards?

MS. BETTS: The Probation Department would like to state we've had an ongoing problem in this district and other federal courts of suicides after sentencing, but before designation for sex offenders. We'll do everything in our power to expedite all the documents and the judgment and everything sent to the Bureau of Prisons official designation ASAP, and that designation could be as brief as possible because of problems with depression and suicide potential.

MS. WHALEN: Mr. Lockhart is in counseling and he's

under electronic monitoring. He lives with another individual, so he's not someone who has extended periods on his own. He's been in counseling, both religious and mental health, addressing this issue. So an expedited date is fine. It's just that if we can set it out for a month.

THE COURT: I will set it out for at least two months, and I would suggest that you work with Ms. Cruz Melendez and Ms. Betts, and we can work something out.

MS. WHALEN: Okay.

THE COURT: I agree that I think the mandatory minimum is sufficient, after considering the factors in 3553(a). So I will sentence the defendant to the custody of the Attorney General or his duly authorized representative for a period of 120 months. $100 special assessment.

What is the supervised release?

MS. BETTS: Any amount of years to life. We had recommended ten.

THE COURT: Ten years supervised release.

I'm also going to recommend mental health and treatment for the defendant while in the custody of the Bureau of Prisons. And as a condition of his supervised release, the Probation Department asks that I include in the J & C a treatment program for sexual disorders, and recommend that the defendant participate in the polygraph examination to obtain information necessary for risk management and

correctional treatment.

The defendant will not associate with any children under 18, unless a responsible adult is present and he has prior approval from the Probation Department.

The defendant must register as a sex offender

MS. MELENDEZ: Your Honor, the government asks that as part of the defendant's sentence, the court pronounce the forfeiture of particular items that contain child pornography, being a Hewlett Packard G-60 laptop computer, and Toshiba 500 gigabyte external hard drive that were seized from the defendant

THE COURT: Any objection?

MS. WHALEN: We consented to the seizure of those items or the forfeiture of those items

THE COURT: Okay. They will be forfeited.

Do I have to sign an order?

MS. MELENDEZ: Yes, your Honor. I believe an order was provided, but I have a copy here. We ask that the order be attached to the J & C.

THE COURT: What we can do is to -- today's the 1st, right?

MS. MELENDEZ: Yes, Your Honor.

MS. BETTS: Yes.

THE COURT: What we can do is make a copy of this, Ana, and give a copy to Ms. Whalen and to Ms. Cruz Melendez,

and then attach a copy to the J & C.

Are there any open counts?

MS. MELENDEZ: Yes, Your Honor, and the government would move to dismiss those counts.

THE COURT: They will be dismissed.

MS. BETTS: The Probation Department would want to inquire with the court if the court would consider a special condition that the defendant not use a computer internet capable device to access pornography of any kind. The definition of pornography being defined in Title 18 United States Code, Section 2256(2), and shall cooperate with the Probation Department Computer and Internet Monitoring Program to remotely access any computer device.

THE COURT: As a condition of supervised release?

MS. BETTS: Correct.

THE COURT: I will make that recommendation and put it in the J & C.

MS. WHALEN: Your Honor, I haven't done the research with respect to the regular pornography, whether or not that's a constitutional condition.

THE COURT: I think the recommendation is for child pornography. It didn't say regular pornography.

MS. BETTS: It was including regular pornography of any kind.

THE COURT: But constitutionally he can see regular

pornography, can't he?

MS. BETTS: It's opposed to treatment plans for sex offender treatment. It doesn't support the treatment plans for sex offender mental health treatment.

MS. WHALEN: If that's a condition of the mental health treatment, maybe we can make it -- if the mental health treatment plan requires no pornography, then that could be a condition of his supervision, because that would be the condition of the mental health treatment?

MS. BETTS: That's feasible, yes.

THE COURT: Will you draft some language, you and Ms. Whalen, and give it to Ana so that she can include it in the
J & C?

MS. BETTS: Yes

MS. WHALEN: So the surrender date would be?

THE COURT: And you will be in touch with the government, when I say the government, I mean Ms. Cruz Melendez, with the prosecutor, and probation.

MS. WHALEN: As well as Ms. Horikawa in the Bureau of Prisons.

THE COURT: Okay.

THE COURT CLERK: April 1st surrender date by I believe it's noon. And it's going to be surrender to the institution?

MS. WHALEN: It will be surrender to the institution.

THE COURT: Okay. Any open counts?

MS. MELENDEZ: Not any more, your Honor. The government moved to dismiss the counts. I believe your Honor ordered that they be dismissed.

THE COURT: Okay. Have a good day.

MS. MELENDEZ: Thank you, Judge.

MS. WHALEN: Thank you.

(The sentencing is concluded.)

AO 245B (Rev. 10/2011 EDNY) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA
v.
AVONDALE LOCKHART

JUDGMENT IN A CRIMINAL CASE

Case Number: 11-CR-0231-SJ

USM Number: 78979-053

Mildred Whalen, One Pierrepont Plz, Bklyn NY 11201
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) two of a two-count indictment.

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty. The Court accepts the plea taken before Magistrate Judge Go on 3/6/2012.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18USC2252(a)(4) and (b)(2)	Possession of child pornography	7/13/2011	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) all open ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/1/2013
Date of Imposition of Judgment

/s/(SJ)
Signature of Judge

STERLING JOHNSON, JR., U.S.D.J.
Name of Judge Title of Judge

A TRUE COPY
ATTEST
DATE 2/11/2013
DOUGLAS C. PALMER
CLERK
BY
DEPUTY CLERK

APP33

AO 245B (Rev. 09/11) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One hundred twenty (120) months.

☑ The court makes the following recommendations to the Bureau of Prisons:

Designation to a Care Level III medical facility close to the state of Florida. Defendant is also to receive mental health treatment and treatment for sexual disorders.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ _____.

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 4/1/2013.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Ten (10) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the pro bation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

notification is not possible, then within forty eight hours after such change;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreem ent to act as an informer or a special agent of a law enforcem ent agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notif third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall perm it the probation officer to m ake such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

SPECIAL CONDITIONS OF SUPERVISION

- the defendant is not to use a computer, Internet capable device, or similar electronic device to access pornography of any kind while in sex offender treatment, unless permitted by the sex offender treatment program. The term "pornography" shall include images or video(s) of adults or minors engaged in "sexually explicit conduct" as that term is defined in Title 18, United States Code, Section 2256(2). The defendant shall also not use a computer, Internet capable device or similar electronic device to view images of naked children. The defendant shall not use his/her computer to view pornography or images of naked children stored on related computer media, such as CD's or DVD's, and shall not communicate via his/her computer with any individual or group who promotes the sexual abuse of children. This condition is recommended due to the conduct comprising the instant offense, and the type of treatment in which the defendant will be engaged during his term of supervised release. Specifically, while participating in sex offender specific mental health treatment, viewing pornography of any kind, including naked children, can be detrimental to and undermine the objectives of treatment. Moreover, should sex offender specific mental health treatment be paired with therapeutic polygraph examinations, viewing pornography of any kind, including images of naked children, can interfere with the testing objectives, eliciting inconclusive test results, again undermining rehabilitation and treatment, which are fundamental goals of sentencing and supervised release. Therefore, while in sex offender mental health treatment, if it is a condition of treatment that the defendant not view adult pornography, i.e., images or video(s) of adults engaged in "sexually explicit conduct" as that term is defined in Title 18, United States Code, Section 2256(2) or naked children, if the defendant views such pornography or images of naked children it will be considered a violation of the conditions of his sex offender mental health treatment and his supervised release. The viewing of child pornography at any time during supervised release will be considered a violation of supervised release as well as a violation of law.

- the defendant shall also cooperate with the U.S. Probation Department's Computer and Internet Monitoring program. Cooperation shall include, but not be limited to, identifying computer systems, Internet capable devices, and/or similar electronic devices the defendant has access to, and allowing the installation of monitoring software/hardware on said devices, at the defendant's expense. The defendant shall inform all parties that access a monitored computer, or similar electronic device, that the device is subject to search and monitoring. The defendant may be limited to possessing only one personal Internet capable device, to facilitate our department's ability to effectively monitor his/her Internet related activities. The defendant shall also permit random examinations of said computer systems, Internet capable devices, similar electronic devices, and related computer media, such as CD's, under his/her control.

Defendant shall participate in a mental health treatment program, which may include participation in a treatment program for sexual disorders, as approved by the Probation Department. The defendant shall contribute to the cost of such services rendered and/or any psychotropic medications prescribed to the degree he is reasonably able, and shall cooperate in securing any applicable third-party payment. The defendant shall disclose all financial information and documents to the Probation Department to assess his ability to pay. As part of the treatment program for sexual disorders, the defendant shall participate in a polygraph examination(s) to obtain information necessary for risk management and correctional treatment.

Defendant shall not associate with any child(ren) under the age of 18, unless a responsible adult is present and he has prior approval from the Probation Department.

Defendant shall comply with the sex offender registration requirements mandated by law.

The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found; the search must also be conducted in a reasonable manner and at a reasonable time; failure to submit to a search may be grounds for revocation; the defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

If deported, the defendant may not re-enter the United States illegally.

The defendant shall not possess a firearm, ammunition, or destructive device.

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

(a) a Hewlett Packard g80 laptop computer; and (b) a Toshiba 500 GB external hard drive.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: AVONDALE LOCKHART
CASE NUMBER: 11-CR-0231-SJ

Judgment—Page 7 of 7

ADDITIONAL FORFEITED PROPERTY

SEE ATTACHED FINAL ORDER OF FORFEITURE: (a) a Hewlett Packard g60 laptop computer; and (b) a Toshiba 500 GB external hard drive.

SLR:LDM:CSK
F#: 2011R00117

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

-against-

AVONDALE LOCKHART,

Defendant.

- - - - - - - - - - - - - - - - - - - X

FINAL ORDER OF FORFEITURE

CR-11-231 (SJ)

WHEREAS, on or about March 6, 2012, the defendant, AVONDALE LOCKHART, entered a plea of guilty to Count Two of an Indictment charging a violation of 18 U.S.C. § 2252(a)(4)(B); and

WHEREAS, the defendant consented to the forfeiture of all his right, title and interest in the following items: (a) a Hewlett Packard g60 laptop computer; and (b) a Toshiba 500 GB external hard drive, seized from the defendant (the "Forfeited Property"), pursuant to 18 U.S.C. § 2253, as property that constitutes (a) any visual depiction described in 18 U.S.C. §§ 2251, 2251A, 2252, 2252A, 2252B or 2260, and any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped and received in violation of the offenses charged; (b) any property, real and personal, constituting or traceable to gross profits and other proceeds obtained from such offenses; and/or (c) any property, real and personal, used or intended to be used to commit or to promote the commission of said offenses or property traceable

to such property, as well as all substitute assets, pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p);

WHEREAS, on or about March 21, 2012, this Court entered a Preliminary Order of Forfeiture, pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p), requiring the defendant to forfeit all his right, title and interest in the Porfeited Property;

WHEREAS, legal notice of forfeiture was published in this district on the official government website, www.forfeiture.gov, for at least thirty (30) consecutive days beginning on April 17, 2012 and ending on May 16, 2012; and

WHEREAS, no third-party has filed with the Court any petition or claim in connection with the Forfeited Property, and the time to do so under 21 U.S.C. § 853(n)(2) has expired;

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED, on consent as follows:

1. Pursuant to Fed. R. Crim. P. 32.2(c)(2), the Preliminary Order of Forfeiture previously entered by this Court is hereby made a Final Order of Forfeiture.

2. All right, title and interest in the Forfeited Property is hereby forfeited to the United States pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p).

3. The United States Marshals Service and/or the United Postal Investigation Service and its duly authorized agents and contractors are hereby directed to dispose of the Forfeited Property in accordance with all applicable laws and rules.

4. The United States District Court for the Eastern District of New York shall retain jurisdiction in this case for the purpose of enforcing this Order.

5. Pursuant to Fed. R. Crim. P. 32.2(b)(4)(a) and (c), this Final Order shall become final as to the defendant at the time of sentencing and shall be made part of the defendant's sentence and included in the judgment of conviction.

6. The Clerk of the Court is directed to send, by inter-office mail, four certified copies of this Final Order to the United States Attorney's Office, Eastern District of New York, ATTN: Maritza Arroyo, FSA Paralegal, 271 Cadman Plaza East, 7th Floor, Brooklyn, New York 11201.

Dated: Brooklyn, New York
~~January~~ Feb 1, 2013

SO ORDERED:

HONORABLE STERLING JOHNSON, JR.
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

No. 14-8358

IN THE SUPREME COURT OF THE UNITED STATES

AVONDALE LOCKHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LESLIE R. CALDWELL
Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

Department of Justice
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QUESTION PRESENTED

Whether petitioner's prior New York conviction for first-degree sexual abuse involving an adult victim constitutes a "conviction under * * * the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," thereby triggering the ten-year mandatory minimum sentence provided in 18 U.S.C. 2252(b)(2).

IN THE SUPREME COURT OF THE UNITED STATES

No. 14-8358

AVONDALE LOCKHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 749 F.3d 148.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2014. A petition for rehearing was denied on October 16, 2014 (Pet. App. 20). The petition for a writ of certiorari was filed on January 14, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). He was sentenced to ten years of imprisonment, to be followed by ten years of supervised release. Pet. App. 28, 34-35. The court of appeals affirmed. Id. at 1-19.

1. In November 2008, agents from United States Immigration and Customs Enforcement (ICE) learned that petitioner had recently wired $1000 to a Russian money courier for a company that distributed child pornography. Presentence Investigation Report (PSR) para. 4. On June 2, 2010, ICE agents and United States postal inspectors sent petitioner a letter inviting him to visit a website where he could purchase child pornography. Petitioner responded, asking to buy six videos depicting children as young as nine years old engaging in sexually explicit conduct. PSR paras. 5-17.

After obtaining a warrant to search petitioner's residence, agents conducted a controlled delivery of a package purporting to contain the videos. When petitioner accepted the package, the agents executed the search warrant. On petitioner's laptop and external hard drive, the agents found more than 15,000

images and at least nine videos containing child pornography. Pet. App. 3.

2. A federal grand jury in the United States District Court for the Eastern District of New York returned an indictment charging petitioner with attempted receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1) (Count 1), and possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and 2252(b)(2) (Count 2). C.A. App. 14. Petitioner pleaded guilty to Count 2, pursuant to a plea agreement that preserved his right to appeal if the district court imposed a ten-year mandatory minimum sentence under 18 U.S.C. 2252(b)(2). C.A. App. 21.

The PSR prepared by the Probation Office noted that petitioner had previously been convicted of first-degree sexual abuse under New York law after he pinned down and attempted to rape his adult girlfriend. PSR paras. 47-48. In light of that conviction, the PSR concluded that petitioner faced a ten-year mandatory minimum term of imprisonment pursuant to Section 2252(b)(2). PSR para. 87. Section 2252(b)(2) requires a district court to sentence any person who is convicted of possessing child pornography in violation of Section 2252(a)(4) to a minimum term of ten years of imprisonment, if that person

> has a prior conviction under this chapter [i.e., chapter 110], chapter 71, chapter 109A, or chapter

> 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography.

18 U.S.C. 2252(b)(2).

Petitioner argued that Section 2252(b)(2) did not apply in his case because his prior state-law conviction for first-degree sexual abuse did not involve a minor. Pet. App. 22-23. The district court overruled that objection. Id. at 23. The court explained that petitioner's prior conviction "fits within th[e] part of [Section 2252(b)(2)] that speaks of a state conviction for aggravated sexual abuse." Ibid. The court sentenced petitioner to ten years of imprisonment, to be followed by ten years of supervised release. Id. at 28, 34-35.

3. The court of appeals affirmed. Pet. App. 1-19. The court held that the phrase "involving a minor or ward" in Section 2252(b)(2) modifies only "abusive sexual conduct," and not "aggravated sexual abuse" or "sexual abuse." Id. at 2. Accordingly, the court held, "a 'sexual abuse' conviction involving an adult victim constitutes a predicate offense" that triggers the ten-year mandatory minimum sentence provided in Section 2252(b)(2). Ibid.

The court of appeals stated that "the plain meaning [of Section 2252(b)(2)] is not pellucid," and it therefore considered two competing canons of statutory interpretation: (i) the "last antecedent rule," under which "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows," Pet. App. 7-8 (quoting United States v. Kerley, 416 F.3d 176, 180 (2d Cir. 2005), cert. denied, 555 U.S. 1159 (2009)); and (ii) the "series qualifier" canon, which "provides that a modifier at the beginning or end of a series of terms modifies all the terms," id. at 8 (quoting United States v. Laraneta, 700 F.3d 983, 989 (7th Cir. 2012), cert. denied, 134 S. Ct. 235 (2013)). The court noted that applying the series-qualifier canon "would eliminate any distinction between 'sexual abuse involving a minor' and 'abusive sexual conduct involving a minor,' since 'abusive sexual conduct involving a minor' seemingly would encompass anything that constitutes 'sexual abuse involving a minor.'" Id. at 10. Petitioner's reading, the court explained, thus "run[s] up against the principle of statutory interpretation that '[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.'" Id. at 10-11 (quoting Bailey v. United States, 516 U.S. 137, 146 (1995)). The court stated, however, that it could

not "definitively determine by applying the canons whether the phrase 'involving a minor or ward' modifies the entire category of state-law sexual abuse crimes or only 'abusive sexual conduct.'" Id. at 12.

The court of appeals therefore looked to the remainder of Section 2252(b)(2) to determine "whether its overall scheme may shed light on what state-law sexual abuse offenses Congress intended to include as predicate offenses." Pet. App. 13. The court noted that, immediately before the reference to state-law crimes, Section 2252(b)(2) imposes an identical ten-year mandatory minimum sentence on defendants who are convicted of possessing child pornography and have a prior federal-law conviction under "[chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)." Ibid. The court explained that those provisions "prohibit sexual conduct, including conduct that may have both minor and adult victims." Ibid. The court further explained that Section 2252(b)(2) "does not specify that a conviction under a federal statute must involve a minor; a violation of any of these statutory provisions constitutes a predicate offense for the application of [Section] 2252(b)(2)'s mandatory minimum sentence, regardless of the age of the victim." Id. at 13-14. The court concluded

that, "[l]ooking at [Section] 2252(b)(2) as a whole, we find, as a number of other circuits have explained, that it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law." Ibid. (quotation marks and citation omitted; citing cases).

The court of appeals stated that "the Sixth, Eighth, and Tenth Circuits have reached the opposite conclusion, namely, that the phrase 'involving a minor or ward' modifies all three categories of state sexual abuse crimes." Pet. App. 15. The court explained, however, that "the Eighth and Tenth Circuits have drawn this conclusion without elaborating on their reasoning," and have expressed that understanding of Section 2252(b)(2)'s scope in cases where it "made little difference * * * since the predicate violations at issue involved minor victims." Id. at 15-16 (citing United States v. Hunter, 505 F.3d 829, 831 (8th Cir. 2007), and United States v. McCutchen, 419 F.3d 1122, 1125 (10th Cir. 2005)). The court further explained that the Sixth Circuit had "reached this conclusion * * * because it found that another panel of that court had 'already considered the proper construction of the statutory language at issue,' and that the prior decision bound the current panel, even though the earlier opinion did not engage in

any express analysis of the statutory language." Id. at 16 (quoting United States v. Mateen, 739 F.3d 300, 304-305 (6th Cir. 2014)).[1] The court stated that it was "not compelled to follow such unexplored assumptions in coming to [its] conclusion here." Ibid. The court of appeals further explained that Section 2252(b)(2)'s "brief legislative history" did not alter the court's conclusion, and that the rule of lenity did not apply because the statutory text allowed the court "to make far more than a guess as to what Congress intended." Id. at 18-19 (internal quotation marks and citations omitted).

ARGUMENT

Petitioner contends (Pet. 26-31) that his New York conviction for first-degree sexual abuse, which involved an adult victim, is not a state-law conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" within the meaning of 18 U.S.C. 2252(b)(2). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision

---

[1] After the court of appeals issued its decision in petitioner's case, the panel opinion in Mateen was vacated and the Sixth Circuit sitting en banc ultimately agreed with the government that Section 2252(b)(2) applies in circumstances like those presented here. United States v. Mateen, 764 F.3d 627, 628 (2014) (en banc) (holding that a state-law conviction for sexual abuse need not involve a minor or ward in order to trigger the sentencing enhancement under Section 2252(b)(2)).

of this Court or any holding of another court of appeals on the specific issue presented in this case. Further review is not warranted.

1. Section 2252(b)(2) sets forth the penalties for possession of child pornography in violation of Section 2252(a)(4). The statute provides that if a person who violates Section 2252(a)(4)

> has a prior conviction under this chapter [i.e., chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. 2252(b)(2). In addition to the Second Circuit in this case, five other courts of appeals have concluded that the term "involving a minor or ward" in Section 2252(b)(2) -- or in similar sentencing provisions contained in 18 U.S.C. 2252(b)(1), 2252A(b)(1), and 2252A(b)(2) -- modifies only "abusive sexual conduct." See United States v. Mateen, 764 F.3d 627, 633 (6th Cir. 2014) (en banc); United States v. Spence, 661 F.3d 194, 197-198 (4th Cir. 2011); United States v. Sinerius, 504 F.3d 737, 740 (9th Cir. 2007), cert. denied, 552 U.S. 1211 (2008); United States v. Hubbard, 480 F.3d 341, 350 (5th Cir.), cert.

denied, 552 U.S. 990 (2007); United States v. Rezin, 322 F.3d 443, 448 (7th Cir. 2003).

Under the "rule of the last antecedent," under which a limiting or modifying phrase "should ordinarily be read as modifying only the noun or phrase that it immediately follows," see Barnhart v. Thomas, 540 U.S. 20, 26 (2003), the portion of Section 2252(b)(2) that describes state-law crimes "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" describes three categories of state-law crimes, only the last of which must involve a minor. See Mateen, 764 F.3d at 631 (stating that the last-antecedent rule applies to Section 2252(b)(2), unless there are "other indicia of meaning to overcome the grammatical presumption") (internal citation and quotation marks omitted).

Petitioner contends that the last-antecedent rule is overcome here by the "series qualifier canon," which applies when "several words are followed by a clause which is applicable as much to the first and other words as to the last." Pet. 26 (quoting Paroline v. United States, 134 S. Ct. 1710, 1721 (2014)). Reading the term "involving a minor or ward" to modify each category of state-law crimes in the relevant clause, however, would render some of the statutory language superfluous. In particular, the term "abusive sexual conduct

involving a minor" would seemingly encompass all conduct that constitutes "sexual abuse involving a minor" and "aggravated sexual abuse involving a minor." Pet. App. 10; see Mateen, 764 F.3d at 631. Because an interpretation of a statute that makes any word, sentence, or clause superfluous should be avoided if possible, see, e.g., TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001), the series-qualifier canon does not "make[] sense" or supply "the more plausible construction" of Section 2252(b)(2). United States v. Bass, 404 U.S. 336, 339-340 (1971).

Other aspects of Section 2252(b)(2) confirm that the phrase "involving a minor" modifies only "abusive sexual conduct" in the relevant clause. In addition to identifying various state-law crimes for which prior convictions will trigger the ten-year statutory minimum sentence, Section 2252(b)(2) lists several categories of federal convictions that will have the same effect. Those include convictions "under this chapter [i.e., chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)." 18 U.S.C. 2252(b)(2). Section 110 covers "sexual exploitation and other abuse of children," 18 U.S.C. 2251-2260A (2012; Supp. 2013); chapter 71 covers "obscenity," 18 U.S.C. 1460-1470; chapter 109A covers "sexual abuse," 18 U.S.C. 2241-2248; chapter 117 covers "transportation for illegal sexual

activity and related crimes," 18 U.S.C. 2421-2428 (2012; Supp. 2013); and article 120 of the Uniform Code of Military Justice covers "rape and sexual assault generally," 10 U.S.C 920. Many of the crimes identified in those various statutory provisions can have adult victims, and there is "no logical reason that Congress would have identified federal offenses not involving minor victims as qualifying predicates while excluding state offenses that criminalize identical conduct." Mateen, 764 F.3d at 631-632; see Spence, 661 F.3d at 197 ("[I]t would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law."); Hubbard, 480 F.3d at 350 (same).

Petitioner contends (Pet. 29-31) that no comparison can be drawn between the federal predicate crimes and the state predicate crimes because Congress specified a much broader range of federal offenses. But while Section 2252(b)(2) does not identify a state-law offense corresponding to every federal crime that triggers the ten-year statutory minimum sentence, the federal offenses that Congress identified within chapter 109A include the federal offenses of "aggravated sexual abuse," 18 U.S.C. 2241; "sexual abuse," 18 U.S.C. 2242; and "sexual abuse of a minor or ward," 18 U.S.C. 2243. Given the striking

similarity between those three federal statutes (the first two of which encompass crimes against adult victims) and the state-law crimes referenced in the portion of the statute at issue here, Congress's intent to capture state-law convictions for "aggravated sexual abuse" and "sexual abuse" of adult victims seems clear. See Mateen, 764 F.3d at 632 ("The parallel between these three federal offenses and the three listed categories of state offenses -- aggravated sexual abuse, sexual abuse, and abusive sexual conduct involving a minor or ward -- is inescapable.").

Petitioner's reliance (Pet. 31) on Section 2252(b)'s legislative history is unavailing. Petitioner points to a single sentence in a Senate Report stating that sentencing enhancements would apply to "a repeat offender with a prior conviction under Chapter 109A or 110 of title 18, or under any State child abuse law or law relating to the production, receipt or distribution of child pornography." Ibid. (quoting S. Rep. No. 358, 104th Cong., 2d Sess. 9 (1996)). That sentence provides no persuasive evidence of Congress's intent in enacting Section 2252(b)(2). Its reference to "State child abuse law[s]" does not accurately describe the text of the statute because prior convictions for "child abuse" do not trigger an enhancement (although convictions for child sexual abuse do).

Even if the Senate Report had referred instead to "any State child sexual abuse law," it would not demonstrate that the only state-law convictions that can trigger Section 2252(b)(2) are convictions for offenses against children. Instead, it would simply reflect the undisputed fact that such offenses are included among those that will trigger an enhanced statutory sentencing range.

2. Petitioner contends (Pet. 13-24) that the court of appeals' decision in this case conflicts with prior decisions of the Eighth Circuit. The court below stated (Pet. App. 15) that the Sixth, Eighth, and Tenth Circuits had "reached the opposite conclusion" from its holding in petitioner's case, i.e., that those courts had understood the phrase "involving a minor or ward" in Section 2252(b)(2) to modify "sexual abuse" and "aggravated sexual abuse" as well as "abusive sexual conduct." The decisions cited by petitioner and the court below do not create a conflict warranting this Court's review on the specific issue presented in this case.

As petitioner recognizes (Pet. 17-18), the Sixth Circuit decision that the court of appeals identified as being in conflict with its holding, United States v. Mateen, 739 F.3d 300 (2014), was subsequently vacated by the en banc court, which held that state-law sexual-abuse convictions involving adult

victims trigger the sentencing enhancement in Section 2252(b)(2). See Mateen, 764 F.3d at 628; note 1, supra.

Petitioner acknowledges (Pet. 11 n.2, 22-24) that the Tenth Circuit has not definitively resolved the question whether state-law "sexual abuse" or "aggravated sexual abuse" convictions must involve a minor in order to trigger the sentencing enhancement in Section 2252(b)(2). In United States v. McCutchen, 419 F.3d 1122 (2005), the court appeared to assume, without deciding, that the defendant's Kansas conviction for sexual battery could not be used to enhance his child-pornography sentence unless it involved a minor victim. See id. at 1125-1127. The defendant argued that, in order to trigger the enhancement, "the statute under which [his] prior state conviction arose must have included as an element the victim's status as a minor." Id. at 1125 (emphasis added). The court of appeals rejected that contention, concluding instead that the sentencing court had appropriately considered matters beyond the statutory elements of the prior offense (in particular, the complaint and the defendant's own statement in the prior criminal case) to determine whether the defendant's conduct had involved a minor victim. Id. at 1124-1127. The Tenth Circuit subsequently acknowledged that it had never squarely decided whether the phrase "involving a minor" in Section 2252(b)(2)

modifies only "abusive sexual conduct." United States v. Becker, 625 F.3d 1309, 1313 n.3 (2010), cert. denied, 131 S. Ct. 2961 (2011). That question remains open in the Tenth Circuit.

Petitioner contends (Pet. 19-22) that, under "a consistent line of Eighth Circuit decisions," any prior state conviction must involve a minor victim in order to trigger the Section 2252(b)(2) enhancement. In fact, the Eighth Circuit has never explicitly addressed that question. In United States v. Hunter, 505 F.3d 829 (2007), the defendant argued that his prior state-law conviction for incest could not be used to enhance his sentence under Section 2252A(b)(2) because, although he had previously admitted that the offense involved minors, the elements of the offense did not require a minor victim. Id. at 830-831. Like the Tenth Circuit in McCutcheon (see p. 15, supra), the court of appeals rejected that contention, holding that "[the] district court may go beyond the elements of [the] crime" to determine whether the prior offense involved a minor. Id. at 831. Similarly in United States v. Linngren, 652 F.3d 868 (2011), cert. denied, 132 S. Ct. 1594 (2012), the Eighth Circuit, without analyzing the language of Section 2252(b)(2), assumed that a prior state-law conviction for "sexual abuse" required "that the victim be a minor" to trigger the sentence enhancement. Id. at 870. As in Hunter, however, the court

denied the defendant relief because it viewed the evidence as showing that the prior offense did "relat[e] to sexual abuse of a minor." Id. at 871.[2]

As the court below explained in this case (Pet. App. 15-16), the Eighth Circuit's assumption in Hunter and Linngren "made little difference * * * since the predicate violations at issue involved minor victims." The Eighth Circuit thus has not squarely addressed, in a case where resolution of the question presented here would be outcome-determinative, whether prior state-law "sexual abuse" or "aggravated sexual abuse" convictions involving adult victims would trigger the ten-year minimum sentence under Section 2252(b)(2) or a similar enhancement provision. If that question is squarely presented in a future case, the Eighth Circuit would not likely view Hunter and Linngren as foreclosing the court from adopting the government's view of the statute. See Prince v. Kids Ark

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[2] Petitioner also relies (Pet. 19-21) on United States v. Trogdon, 339 F.3d 620 (8th Cir. 2003), and United States v. Weis, 487 F.3d 1148 (8th Cir. 2007). In those cases, the Eighth Circuit considered only whether the prior offenses were "conviction[s] relating to * * * abusive sexual conduct involving a minor," the category of state-law offenses that both parties agree must involve a minor victim. Trogdon, 339 F.3d at 621; Weis, 487 F.3d at 1151 (internal quotation marks omitted). As in Hunter and Linngren, moreover, the defendants' prior offenses in both cases were found to have involved minor victims. Trogdon, 339 F.3d at 621; Weis, 487 F.3d at 1149.

Learning Center, LLC, 622 F.3d 992, 995 n.4 (8th Cir. 2010) (suggestion in prior decision does not control if relevant question was not actually at issue); see Brecht v. Abrahamson, 507 U.S. 619, 630-31 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [the answer], we are free to address the issue on the merits."). Accordingly, although petitioner asserts (Pet. 22) that "similarly situated defendants" are presently suffering "disparate penalties," petitioner identifies no case in which a court has declined to apply Section 2252(b)(2) or a similar sentence-enhancement provision on the ground that the defendant's prior state sexual-abuse conviction involved an adult victim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2015

No. 14-8358

In the

Supreme Court of the United States

Avondale Lockhart,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

Reply Brief for Petitioner

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TABLE OF CONTENTS

Page

Table of Authorities ii

Preliminary Statement 1

Argument 1

A. The decision below deepens the circuit split over whether a prior state conviction must involve a minor to trigger the § 2252(b)(2) enhancement. 3

B. The decision below is wrong. 4

Conclusion 7

TABLE OF AUTHORITIES

Cases

Moskal v. United States,
498 U.S. 103 (1990) 5

United States v. Barker,
723 F.3d 315 (2d Cir. 2013) 6

United States v. Bass,
404 U.S. 336 (1971) 5

United States v. Hubbard,
480 F.3d 341 (5th Cir. 2007) 7

United States v. Hunter,
505 F.3d 829 (8th Cir. 2007) 2, 3

United States v. Linngren,
652 F.3d 868 (8th Cir. 2011) 2, 3, 4

United States v. Mateen,
764 F.3d 627 (6th Cir. 2014) 6

United States v. Sinerius,
504 F.3d 737 (9th Cir. 2007) 7

United States v. Trogdon,
339 F.3d 620 (8th Cir. 2003) 2, 3, 4

United States v. Weis,
487 F.3d 1148 (8th Cir. 2007) 2, 3

Statutes

18 U.S.C. § 2241 6

18 U.S.C. § 2242 6

18 U.S.C. § 2243 6

18 U.S.C. § 2251 6

18 U.S.C. § 2252 6

18 U.S.C. § 2252A 6

18 U.S.C. § 2252(b)(1) 3

18 U.S.C. § 2252(b)(2) 1, 2, 4, 5

Preliminary Statement

The courts of appeals have split sharply over the question presented, namely, whether a prior state conviction must involve a minor to trigger the enhanced sentencing ranges in 18 U.S.C. § 2252(b)(2) and similar penalty provisions. Respondent does not dispute that the Eighth Circuit, alone among the circuits, has always insisted on evidence of a minor victim before applying the enhancements at issue. Nor does respondent dispute that this petition offers a clean vehicle to resolve this pure question of statutory interpretation. Instead, respondent muddies the waters, suggesting that the Eighth Circuit has been less than unequivocal (it hasn't) and might depart from its consistent line of precedents in a hypothetical future case (it won't). Neither contention counsels against review. Certiorari should be granted to resolve this acknowledged split and bring uniformity to the imposition of these severe mandatory minimum punishments.

Argument

A. The decision below deepens the circuit split over whether a prior state conviction must involve a minor to trigger the § 2252(b)(2) enhancement.

Petitioner has identified a five-to-one split on the question presented. The Second, Fourth, Fifth, Sixth, and Ninth Circuits all hold that a state conviction relating to "aggravated sexual abuse" or "sexual abuse" need not involve a minor to trigger the sentencing enhancements in § 2252(b)(2) and similar provisions. In sharp contrast, the Eighth Circuit has repeatedly required that any prior state

conviction involve a minor to qualify as a § 2252(b)(2) predicate. That conflict warrants review.

In multiple published decisions over the past decade, the Eighth Circuit, when confronted with prior state convictions that relate to "aggravated sexual abuse" or "sexual abuse," has insisted on evidence—from charging documents, the defendant's assent, or comparable sources—that these offenses have involved minors. *See United States v. Linngren*, 652 F.3d 868, 870 (8th Cir. 2011); *United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007); *United States v. Weis*, 487 F.3d 1148, 1152 (8th Cir. 2007); *United States v. Trogdon*, 339 F.3d 620, 621 (8th Cir. 2003). In the face of these decisions, respondent argues that the Eighth Circuit "has not squarely addressed" the question presented because, in each of these cases, the Eighth Circuit concluded that a minor was involved. BIO 17.

Respondent's observation diminishes neither the starkness of the split nor the need for this Court's intervention. The Eighth Circuit would not have undertaken to review the records underlying the prior state convictions in any of these cases if it had not deemed that task compelled by the text of the statutory enhancements. Embracing respondent's interpretation of the statutory text would have offered a far simpler path to affirmance and avoided contentious questions regarding which record materials were properly considered in the inquiry. *Cf. Linngren*, 652 F.3d at 872 (Bye, J., dissenting) (criticizing panel majority for relying on probable cause portion of state criminal complaint). Indeed, in *Linngren*,

respondent conceded that a prior state offense must involve a minor to trigger the § 2252(b)(1) enhancement. *See* Position of the Government with Respect to Sentencing 3, *United States v. Linngren*, No. 09 Cr. 259 (D. Minn. March 3, 2010), ECF No. 38 ("The statute is over-inclusive under the categorical approach with regards to whether such a conviction qualifies as sexual abuse of a minor ... (i.e. the Minnesota statute is silent on the age of the victim)."). The conclusion is inescapable. The Eighth Circuit has always asked whether a prior state conviction involves a minor because the court does not believe that the enhancements apply otherwise.[1]

Respondent, in essence, argues for further percolation, speculating that "the Eighth Circuit would not likely view *Hunter* and *Linngren* as foreclosing the court from adopting the government's view of the statute" in a "future case." BIO 17–18. That hypothetical future case may never arrive. Because the Eight Circuit has always demanded evidence that a prior conviction involve a minor, AUSAs within that jurisdiction appear not to seek, and district courts appear not to apply, the

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[1] Respondent suggests that *Weis* and *Trogdon* shed little light on the Eighth Circuit's position because "those cases ... considered only whether the prior offenses were 'conviction[s] relating to ... abusive sexual conduct involving a minor,' the category of state law offenses that both parties agree must involve a minor victim." BIO 17 n.2. The Eighth Circuit has never adopted the sharp distinction among state-law predicates that respondent proposes and other circuits have embraced, but has instead treated the categories of "sexual abuse" and "abusive sexual conduct" as interchangeable. *See, e.g.*, *Weis*, 487 F.3d at 1152 (noting that mens rea of defendant's prior "demonstrates the offense is one 'relating to' sexual abuse"); *Linngren*, 652 F.3d at 873 (Bye, J., dissenting) (describing *Weis* as "holding [that] defendant's prior conviction for assault related to sexual abuse of a minor").

enhancements in cases lacking such proof. For the same reason, respondent's observation that petitioner "identifies no case in which a court has declined to apply Section 2252(b)(2) ... on the ground that the defendant's prior state sexual abuse conviction involved an adult victim," BIO 18, is beside the point. Respondent has identified no Eighth Circuit case going the other way either, nor any case in which it has even pursued the enhancement against a defendant convicted of sexual abuse of an adult. Rather, the unbroken line of decisions requiring a minor victim, from *Trogdon* through *Linngren*, has presumably dissuaded Eighth Circuit AUSAs from seeking these enhancements except in the circumstances contemplated by circuit precedent. This Court ought not abstain from resolving a ripe split in anticipation of a circuit course-correction unlikely to ever come.

B. The decision below is wrong.

On the merits, petitioner has explained why the Second Circuit's decision below ignores the most natural reading of the statutory text, as illuminated by the series qualifier canon. Respondent, echoing the decision below, counters that petitioner's reading—under which "involving a minor or ward" modifies "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact"—"would render some of the statutory language superfluous." BIO 10. That is so, respondent contends, because "the term 'abusive sexual contact involving a minor' would seemingly encompass all conduct that constitutes 'sexual abuse involving a minor' and 'aggravated sexual abuse involving a minor.'" BIO 10–11.

Of course, this Court ordinarily construes statutes to avoid superfluity. But that principle is not decisive here because § 2252(b)(2) contains surplusage even on respondent's reading. Specifically, on respondent's interpretation, "aggravated sexual abuse" does no independent work, because all "aggravated sexual abuse" is necessarily "sexual abuse" as well. Granting that § 2252(b)(2) contains redundancy—a conclusion fortified by the clause punishing the "production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography"—the more reasonable reading is that Congress used overlapping terms to emphasize its intent to cover a broad continuum of punishable conduct. *See, e.g., Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting) (noting that canon against superfluity should not be applied "to the obvious instances of iteration to which lawyers, alas, are particularly addicted," and concluding that statutory phrase "'falsely made, forged, altered, or counterfeited' is self-evidently not a listing of differing and precisely calibrated items, but a collection of near synonyms which describes the general crime of forgery").

Congress made the deliberate choice to emphasize the breadth of abuse of children it intended to encompass by including three forms of such abuse and offenses "relating to" them. Where overlapping terms manifest Congress's intent to capture a wide range of behavior, this Court treats those terms as an integrated unit, with any final modifier applied to the whole, per the series qualifier canon. *See, e.g., United States v. Bass*, 404 U.S. 336, 337 (1971) (applying canon to

statutory phrase "receives, possesses, or transports in commerce or affecting commerce").

Respondent also notes that "[m]any of the crimes identified in" the enhancement provisions at issue "can have adult victims, and there is 'no logical reason that Congress would have identified federal offenses not involving minor victims as qualifying predicates while excluding state offenses that criminalize identical conduct." BIO 12 (quoting *United States v. Mateen*, 764 F.3d 627, 631–32 (6th Cir. 2014) (en banc)). Petitioner has already explained (Pet. 29–31) that the plain text of the penalty provisions demonstrate Congress's intent to achieve just this result, and respondent properly concedes as much. *See* BIO 12 (Section 2252(b)(2) "does not identify a state-law offense corresponding to every federal crime that triggers the ten-year statutory minimum sentence"). For good measure, there is a perfectly logical explanation for Congress's choice: Congress knew what conduct it was capturing under federal sexual abuse law and was confident that all covered offenses were proper predicates. Because Congress did not have the same familiarity with the sexual abuse laws of all 50 states, it adopted a floor: qualifying offenses must not only have been sexual and abusive but, consistent with the offenses punishable under §§ 2251, 2252, and 2252A, must have involved children.[2]

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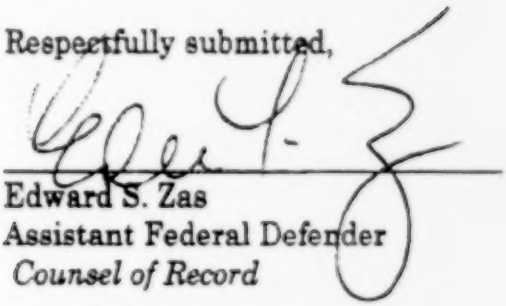
[2] Respondent also points out the "striking similarity" between the terms "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact" and the federal offenses listed at §§ 2241–43, contending that the former track the latter. BIO 12–13. Respondent neglects to mention that the courts of appeals—including several on the majority side of the split implicated here—have concluded that the terms "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" in

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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the enhancement provisions do not incorporate the definitions of the §§ 2241–43 offenses. *See, e.g., United States v. Barker*, 723 F.3d 315, 322–23 (2d Cir. 2013); *United States v. Sinerius*, 504 F.3d 737, 742–43 (9th Cir. 2007); *United States v. Hubbard* , 480 F.3d 341, 348 (5th Cir. 2007).

No. 14-8358

IN THE

Supreme Court of the United States

AVONDALE LOCKHART,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED MAY 26, 2015

TABLE OF APPENDICES

Page

APPENDIX A RELEVANT DOCKET ENTRIES.... 1

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 16, 2014..... 8

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 15, 2014 9

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED FEBRUARY 13, 2013. 25

APPENDIX E — INDICTMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED MARCH 24, 2011. 39

APPENDIX F — TRANSCRIPT OF SENTENCING IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED FEBRUARY 1, 2013 43

APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, NO. 2013-602

Date Filed	#	Docket Text
2/21/2013	1	NOTICE OF CRIMINAL APPEAL, with district court docket, on behalf of Appellant Avondale Lockhart, FILED. [851902] [13-602] [Entered: 02/21/2013 10:15 AM]
6/26/2013	26	APPENDIX, volume 1 of 1, (pp. 1-109), on behalf of Appellant Avondale Lockhart, FILED. Service date 06/26/2013 by US mail, CM/ECF. [976391] [13-602] [Entered: 06/26/2013 04:39 PM]
6/26/2013	27	BRIEF, on behalf of Appellant Avondale Lockhart, FILED. Service date 06/26/2013 by CM/ECF, US mail. [976395] [13-602] [Entered: 06/26/2013 04:40 PM]
9/25/2013	47	BRIEF, on behalf of Appellee USA United States of America, FILED. Service date 09/25/2013 by CM/ECF. [1051213] [13-602] [Entered: 09/25/2013 04:20 PM]

10/15/2013	57	REPLY BRIEF, on behalf of Appellant Avondale Lockhart, FILED. Service date 10/15/2013 by CM/ECF, US mail. [1066135] [13-602] [Entered: 10/15/2013 04:38 PM]
1/14/2014	69	CASE, before RAK, Ch. J., CJS, RJL, C.JJ., HEARD.[1133306] [13-602] [Entered: 01/14/2014 11:32 AM]
5/15/2014	77	OPINION, the district court judgment is affirmed, by RAK, CJS, RJL, FILED. [1225104] [13-602] [Entered: 05/15/2014 09:37 AM]
5/15/2014	81	JUDGMENT, FILED. [1225682] [13-602] [Entered: 05/15/2014 02:57 PM]
6/3/2014	86	MOTION ORDER, granting motion to extend time until 06/13/2014, to file a petition for rehearing or rehearing en banc [82] filed by Appellant Avondale Lockhart, by RJL, FILED. [1238948] [86] [13-602] [Entered: 06/03/2014 10:35 AM]
6/13/2014	87	PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant Avondale Lockhart, FILED. Service date 06/13/2014 by CM/ECF, US mail. [1248253] [13-602] [Entered: 06/13/2014 02:22 PM]

Appendix A

10/16/2014	91	ORDER, petition for rehearing en banc denied, FILED. [1345940] [13-602] [Entered: 10/16/2014 11:34 AM]
10/23/2014	92	JUDGMENT MANDATE, ISSUED. [1351937] [13-602] [Entered: 10/23/2014 10:23 AM]
2/9/2015	95	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 02/09/2015, U.S. Supreme Court docket #14-8358, RECEIVED. [1435699] [13-602] [Entered: 02/10/2015 03:30 PM]
5/26/2015	96	U.S. SUPREME COURT NOTICE, dated 05/26/2015, U.S. Supreme Court docket # 14-8358, stating the petition for writ of certiorari is granted, RECEIVED. [1517620] [13-602] [Entered: 05/26/2015 02:54 PM]

Appendix A

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK (BROOKLYN), CRIMINAL DOCKET FOR CASE #: 1:11-cr-00231-SJ-1

Date Filed	#	Docket Text
1/24/2011	1	SEALED COMPLAINT as to Avondale Lockhart (1). (DiLorenzo, Krista) [1:11-mj-00074-JMA] (Entered: 01/25/2011)
3/24/2011	13	INDICTMENT as to Avondale Lockhart (1) count(s) 1-2. (Attachments: # 1 Criminal Information Sheet) (Siegfried, Evan) (Entered: 03/25/2011)
3/6/2012	30	Minute Entry for proceedings held before Magistrate Judge Marilyn D. Go: Change of Plea Hearing as to Avondale Lockhart held on 3/6/2012. Appearances: AUSA Jessica Reid and Def counsel Mildred Whalen. Case called. Deft sworn, informed of rights and waives trial before District Court. Deft enters a guilty plea to count 2 of the Indictment.
12/13/2012	44	SENTENCING MEMORANDUM by Avondale Lockhart (Whalen, Mildred) (Entered: 12/13/2012)

1/11/2013	46	SENTENCING MEMORANDUM by USA as to Avondale Lockhart (Cruz Melendez, Maria) (Entered: 01/11/2013)
1/17/2013	47	Letter *in Connection with January 18, 2013 Sentencing Regarding Letter from the Federal Bureau of Prisons* as to Avondale Lockhart (Attachments: # 1 Enclosure) (Cruz Melendez, Maria) (Entered: 01/17/2013)
1/17/2013	48	SENTENCING MEMORANDUM by Avondale Lockhart (Whalen, Mildred) (Entered: 01/17/2013)
1/17/2013	50	SENTENCING MEMORANDUM by Avondale Lockhart (Whalen, Mildred) (Entered: 01/17/2013)
2/1/2013	51	Minute Entry for proceedings held before Judge Sterling Johnson, Jr: Sentencing held on 2/1/2013 for Avondale Lockhart (1), Count(s) 1, Count(s) 2, 120 months imprisonment followed by 10 years supervised release and $100.00 special assessment fee. Dismissed by Government's motion in open court; The court recommends to BOP that defendant receive mental health and treatment for sexual disorders while in custody and as

a special condition of supervision. Special conditions of supervision include: no association with children as specified by probation, polygraph testing and limitation of computer use as recommended, determined and defined by probation and goals of the treatment program. Forfeiture order. Open charges are dismissed upon motion by the government. Defendant is to self-surrender to the institution designated by the Marshals of this District by noon on 4/1/13. The Court accepts the plea taken before Magistrate Judge Go on 3/6/12. (Court Reporter Fred Guerino) (Guzzi, Roseann) (Entered: 02/04/2013)

2/11/2013	52	SENTENCING MEMORANDUM by Avondale Lockhart (Whalen, Mildred) (Entered: 02/11/2013)
2/13/2013	54	JUDGMENT dated 2/11/13 as to Avondale Lockhart (1), defendant is sentenced to Count(s) 2, 120 months imprisonment followed by 10 years supervised release and $100.00 special assessment fee; Count(s) 1, dismissed by Government's motion in open court; the court recommends to the BOP: designation to a Care Level III medical facility close to the state of Florida.

Defendant is also to receive mental health treatment for sexual disorders. The defendant shall surrender for service of sentence at the institution designed by the BOP by 2pm on 4/1/13. Special conditions of supervision. Attached order of forfeiture. (Ordered by Judge Sterling Johnson, Jr on 2/11/2013). Ordered by Judge Sterling Johnson, Jr on 2/11/2013. (Attachments: # 1 Final Order of Forfeiture) (Guzzi, Roseann) (Entered: 02/13/2013)

2/15/2013	57	NOTICE OF APPEAL by Avondale Lockhart re 54 Judgment. No fee paid; defendant is represented by Federal Defenders counsel. Service done electronically. (Manuel, Germaine) (Entered: 02/15/2013)
10/23/2014	60	MANDATE of USCA (certified copy) as to Avondale Lockhart. It is Ordered that the judgment of the District Court is AFFIRMED in accordance with the Opinion of this Court. Issued as Mandate: 10/23/14. (Attachments: # 1 Opinion) (McGee, Mary Ann) (Entered: 10/23/2014)

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 16, 2014

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of October, two thousand fourteen,

UNITED STATES OF AMERICA,

Appellee,

v.

AVONDALE LOCKHART,

Defendant-Appellant.

ORDER

Docket No.: 13-602

Appellant Avondale Lockhart filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
s/ Catherine O'Hagan Wolfe

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 15, 2014

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2013

January 14, 2014, Argued May 15, 2014, Decided

Docket No. 13-602-cr

UNITED STATES OF AMERICA,

Appellee,

— v. —

AVONDALE LOCKHART,

Defendant-Appellant.

Before: KATZMANN, *Chief Judge*, STRAUB and LOHIER, *Circuit Judges.*

KATZMANN, *Chief Judge*:

In this case, we must decide whether a sentencing provision that provides for a ten-year mandatory minimum term of imprisonment if a defendant was previously convicted "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual

conduct involving a minor or ward," 18 U.S.C. § 2252(b)(2), requires that an "aggravated sexual abuse" or "sexual abuse" conviction involve a minor or ward, or whether only "abusive sexual conduct" is modified by the phrase "involving a minor or ward," such that a sexual abuse conviction involving an adult victim constitutes a predicate offense. We conclude that the statutory text and structure indicate that the latter reading is correct and therefore affirm the district court's imposition of a ten-year sentence on Defendant-Appellant Avondale Lockhart.

Background

In June 2010, after receiving information indicating that Lockhart had transferred money to a distributor of child pornography, federal agents initiated an undercover operation, in which they solicited Lockhart to purchase videos portraying child pornography from an agent-run service. Lockhart requested a number of videos from the agents, and on July 13, 2010, after obtaining a search warrant, the agents conducted a controlled delivery of the package ostensibly containing the videos Lockhart had ordered. Once Lockhart accepted the package, the agents executed the search warrant and seized Lockhart's laptop and external hard drive, which together contained over 15,000 images and at least nine videos depicting child pornography.

As a result of this investigation, Lockhart was indicted on March 24, 2011, on two counts: (1) attempted receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2), based on his attempted purchase of videos containing

child pornography from the undercover agents; and (2) possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), based on the images and videos already on his computer and hard drive. On March 6, 2012, pursuant to a plea agreement, Lockhart pleaded guilty to count two of the indictment in the United States District Court for the Eastern District of New York. Count one of the indictment was thereafter dismissed.

Lockhart had previously been convicted in state court in April 2000 of first degree sexual abuse, in violation of New York Penal Law § 130.65(1). The arrest report from this earlier conviction alleges that Lockhart pinned down his fifty-three-year old girlfriend, ripped off her underpants, and attempted to penetrate her vagina with his penis. Lockhart received a sentence of five years' probation and was classified as a level-one sex offender as a result of this conviction.

The Presentence Report ("PSR") prepared for Lockhart's sentencing calculated a recommended sentencing range of 78-97 months under the U.S. Sentencing Guidelines. However, the PSR adopted the government's position that Lockhart was subject to a mandatory minimum sentence of ten years under 18 U.S.C. § 2252(b)(2), which requires such a term of imprisonment if a person violates § 2252(a)(4) and "has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252(b)(2). The PSR thus recommended an effective range under the Sentencing Guidelines of 120 months due to Lockhart's

prior conviction for sexual abuse in the first degree. In his sentencing submission, Lockhart argued that his prior conviction could not support the imposition of the mandatory minimum sentence because his sexual abuse offense did not involve a minor. The district court rejected Lockhart's position, concluding that the mandatory minimum applied, and imposed a ten-year sentence, to be followed by ten years' supervised release. This appeal followed.

Discussion

As discussed above, Lockhart pleaded guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4) and was sentenced pursuant to § 2252(b)(2). While § 2252(b)(2) generally requires no minimum sentence, in certain circumstances the statute provides for a mandatory minimum sentence of ten years. In its entirety, § 2252(b)(2) provides:

> Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice), or *under*

> *the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor* or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 2252(b)(2) (emphasis added).[1]

Here, the district court found that Lockhart was subject to the mandatory minimum based on his prior state conviction for sexual abuse of an adult woman. On appeal, Lockhart challenges that conclusion, arguing that § 2252(b)(2)'s mandatory minimum does not apply if the victim of the prior sexual abuse offense is an adult, rather than a minor. Thus, the sole issue on appeal is whether the phrase "involving a minor or ward" modifies an entire category of state-law crimes--those "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct"--or whether "involving a minor or ward" modifies only its immediately preceding antecedent, "abusive sexual conduct." "We review de novo all questions of law relating to the district court's application of a federal

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1. Language identical or similar to the key phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" is used in four other sentencing provisions in Chapter 110 of Title 18 of the United States Code. *See* 18 U.S.C. §§ 2251(e) (referring to "abusive sexual contact," rather than "conduct"), 2252(b)(1), 2252A(b)(1), 2252A(b)(2).

sentence enhancement." *United States v. Beardsley*, 691 F.3d 252, 257 (2d Cir. 2012).[2]

In interpreting § 2252(b)(2), "[w]e start, as we must, with the language of the statute," giving the statutory terms their "'ordinary or natural' meaning." *Bailey v. United States*, 516 U.S. 137, 144-45, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 228, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993)), *superseded by statute on other grounds*, Pub. L. No. 105-386, 112 Stat. 3469 (1998) (codified as amended at 18 U.S.C. § 924(c)). Where, as here, the plain meaning is not pellucid, we can draw upon a variety of interpretive tools, including canons, statutory structure, and legislative history, to discern meaning. As to canons, we first consider which rule of statutory construction should inform our understanding of the phrase "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor": the last antecedent rule or the series qualifier canon.

"Under the last antecedent rule, 'a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *United States*

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2. As part of his plea agreement, Lockhart waived his right to appeal his sentence but excluded from that waiver the issue now before the Court. On March 26, 2013, the government filed a motion to dismiss Lockhart's appeal based on this waiver. However, on July 8, 2013, the government moved to withdraw its motion to dismiss, acknowledging that the instant issue fell outside the scope of the appeal waiver. The Court granted the government's motion to withdraw its prior motion on July 9, 2013. Therefore, waiver is not at issue, and we proceed to the merits of Lockhart's claim.

v. Kerley, 416 F.3d 176, 180 (2d Cir. 2005) (ellipsis omitted) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003)). Although the "rule is not an absolute and can assuredly be overcome by other indicia of meaning," the last antecedent rule generally applies absent a contrary indication of meaning. *Barnhart*, 540 U.S. at 26 (citing 2A N. Singer, *Sutherland on Statutory Construction* § 47.33 at 369 (6th rev. ed. 2000)). Relying on this presumption, the government contends that, as the district court concluded, the phrase "involving a minor or ward" modifies only "abusive sexual conduct," and therefore Lockhart's prior state conviction for sexual abuse triggers the imposition of § 2252(b)(2)'s ten-year mandatory minimum sentence, regardless of the fact that the victim of his prior offense was an adult.

Lockhart argues in favor of the application of the contrary series qualifier canon of statutory construction, which "provides that a modifier at the beginning or end of a series of terms modifies all the terms." *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012). The series qualifier canon applies where "[t]he modifying clause appear[s] . . . at the end of a single, integrated list," *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 344 n.4, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005), and where the modifying clause "undeniably applies to at least one antecedent, and . . . makes sense with all," *United States v. Bass*, 404 U.S. 336, 339-40, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971). Lockhart contends that this canon should be applied, as the phrase "involving a minor" appears at the end of the integrated list of three antecedents, all of which would "make[] sense" if limited by this modifying clause.

Appendix C

Lockhart and the government put forth various arguments to support reliance on their preferred canons. We are not fully persuaded that either canon applies unambiguously based on the language and structure of this statutory phrase alone. For example, while Lockhart is correct that the modifying clause "involving a minor" appears at the end of this particular list of state-law crimes, this is not the prototypical situation in which the series qualifier canon is applied, since the list itself falls in the middle of a longer list of qualifying predicate crimes; that is, the modifier does not end the list in its entirety. *Cf. Bass*, 404 U.S. at 337 (applying the series qualifier rule to the phrase "receives, possesses, or transports in commerce or affecting commerce" where that series provided the sole list of conduct prohibited by the statute). On the other hand, the inclusion of the word "or" before "abusive sexual conduct" and then again before "the production of child pornography" in the immediately following clause suggests that the state sexual abuse crimes are set off as a separate list within the larger list, lending some support to Lockhart's preferred reading.[3]

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3. Although we do not deem this dispositive on its own, we note that 18 U.S.C. § 2251(e)'s similar language differs from that used in § 2252(b)(2) in a manner that sheds some light on the present dispute. Specifically, § 2251(e) imposes a heightened sentence on defendants convicted of prior crimes "under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production . . . of child pornography." In this context, aggravated sexual abuse, sexual abuse, and abusive sexual conduct do not form their own separate list ending in a common modifier; rather, "abusive sexual contact involving a minor or ward" is the third element of a four-element list ending

We are not persuaded by Lockhart's position that the three types of state sexual abuse offenses constitute a related "continuum of conduct," each element of which should be modified by the phrase "involving a minor" to maintain a common limitation on the entire continuum. Br. for Def.-Appellant at 20. Such a reading would eliminate any distinction between "sexual abuse involving a minor" and "abusive sexual conduct involving a minor," since "abusive sexual conduct involving a minor" seemingly would encompass anything that constitutes "sexual abuse involving a minor," as well as, for example, other sexual conduct that may be criminalized only when the victim is a child. *See, e.g., United States v. Hubbard*, 480 F.3d 341 (5th Cir. 2007) (finding a conviction for "soliciting sex from a person the Defendant believed to be under sixteen" to constitute a conviction relating to "abusive sexual conduct involving a minor"). Thus, Lockhart's proposed reading may run up against the principle of statutory interpretation that "[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Bailey*, 516 U.S. at 146.

At the same time, neither are we convinced by the government's contention that the fact that there is no comma separating "abusive sexual conduct" from the modifier "involving a minor or ward" itself proves that "involving a minor or ward" should be read together with "abusive sexual conduct," but not with "aggravated

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in "sex trafficking of children." We assume that Congress intended § 2251(e)'s similar language to be read in tandem with § 2252(b)(2). Thus, the addition of a fourth element in § 2251(e) after the modifier suggests that the series qualifier canon should not be applied.

sexual abuse" or "sexual abuse." We have previously acknowledged that "[o]ne of the methods by which a writer indicates whether a modifier that follows a list of nouns or phrases is intended to modify the entire list, or only the immediate antecedent, is by punctuation--specifically by whether the list is separated from the subsequent modifier by a comma." *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781-82 (2d Cir. 2013). However, while a comma may be a helpful aid to statutory interpretation, inclusion of such a comma is not a hard-and-fast rule of grammar. *See Bass*, 404 U.S. at 340 n.6 ("[M]any leading grammarians, while sometimes noting that commas at the end of series can avoid ambiguity, concede that use of such commas is discretionary."). Here, inserting a comma before "involving a minor or ward" might confuse rather than clarify the meaning of this provision because, as discussed above, the relevant series of state sexual abuse offenses is separated only by a comma from a continuing list of state child pornography offenses. In this case, then, adding a comma before "involving a minor or ward" might make the modifying clause appear to be a separate element in a longer list and would, in any case, be grammatically unnecessary. Accordingly, here, basing our analysis "only on punctuation is necessarily incomplete and runs the risk of distorting [the] statute's true meaning." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993). While the lack of a separating comma may run contrary to Lockhart's interpretation, it is not dispositive of our reading of § 2252(b)(2). *See United States v. Rezin*, 322 F.3d 443, 448 (7th Cir. 2003).

Ultimately, we cannot definitively determine by applying the canons whether the phrase "involving a minor or ward" modifies the entire category of state-law sexual abuse crimes or only "abusive sexual conduct." While the government's reading appears to have greater support in the relevant clause, lingering ambiguity prevents us from concluding on this basis alone that the government's interpretation is the correct one. However, this ambiguity does not end our inquiry into the meaning of the statutory text. Rather, it is well established that statutory phrases should not be construed "in isolation; we read statutes as a whole." *Samantar v. Yousuf*, 560 U.S. 305, 319, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010) (quoting *United States v. Morton*, 467 U.S. 822, 828, 104 S. Ct. 2769, 81 L. Ed. 2d 680 (1984)).

Accordingly, we look to the remainder of § 2252(b)(2) and consider whether its overall scheme may shed light on what state-law sexual abuse offenses Congress intended to include as predicate offenses for imposition of the mandatory minimum sentence. In addition to imposing a ten-year term of imprisonment for predicate violations of state law, § 2252(b)(2) also provides for such a sentence if the defendant has a prior conviction under federal law for a violation under "[chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice)." The referenced statutes prohibit sexual conduct, including conduct that may have both minor and adult victims. *See* 18 U.S.C. §§ 1460-1470 (Chapter 71, offenses relating to obscene matter, materials or language); 18 U.S.C. §§ 2241-2248 (Chapter 109A, sexual abuse of adults or minors); 18

U.S.C. §§ 2251-2260A (Chapter 110, sexual exploitation and other abuse of minors); 18 U.S.C. §§ 2421-2428 (Chapter 117, transportation of adults or minors for illegal sexual activity and related crimes); 10 U.S.C. § 920 (rape and sexual assault under the Uniform Code of Military Justice). Importantly, § 2252(b)(2) does not specify that a conviction under a federal statute must involve a minor; a violation of any of these statutory provisions constitutes a predicate offense for the application of § 2252(b)(2)'s mandatory minimum sentence, regardless of the age of the victim.

Looking at § 2252(b)(2) as a whole, we find, as a number of other circuits have explained, that "it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law." *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011); *see also Hubbard*, 480 F.3d at 350 ("Read in context, the phrase 'involving a minor' modifies only 'abusive conduct.' We are persuaded this was the intent of Congress, not simply because of the placement of the phrase 'involving a minor,' but because the enumeration of prior federal offenses that will also give rise to a mandatory minimum sentence expressly includes sexual abuse of adults or minors."); *Rezin*, 322 F.3d at 448 ("[I]t would have been strange had Congress on the one hand authorized heavier punishment for offenders who had a prior *federal* conviction for a sexual crime whether or not it involved a minor, and on the other hand insisted that if the prior conviction had been for a state offense, even one identical to one of the enumerated

federal offenses, the victim had to be a minor."); *cf. United States v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007) (assuming, without analysis, that "the terms 'aggravated sexual abuse,' 'sexual abuse,' and 'abusive sexual conduct involving a minor' under § 2252A(b)" set forth distinct offenses); *United States v. West*, 333 F. App'x 494 (11th Cir. 2009) (per curiam) (holding that it was not plain error to apply the mandatory minimum to a prior conviction where the state law at issue did not always require an actual minor victim). This reasoning compels us to conclude that "involving a minor or ward" modifies only prior state convictions for "abusive sexual conduct," not those for "sexual abuse" or "aggravated sexual abuse," each of which would constitute a predicate *federal* offense if committed against an adult or a child.

We acknowledge that the Sixth, Eighth and Tenth Circuits have reached the opposite conclusion, namely, that the phrase "involving a minor or ward" modifies all three categories of state sexual abuse crimes. However, the Eighth and Tenth Circuits have drawn this conclusion without elaborating on their reasoning. Indeed, these circuits appear merely to have assumed that a prior state-law sexual abuse conviction requires a minor victim for purposes of the sentencing enhancement, an assumption that made little difference in those cases since the predicate violations at issue involved minor victims. *See United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007) (relying on this assumption); *United States v. McCutchen*, 419 F.3d 1122, 1125 (10th Cir. 2005) (considering whether "the statute under which [a] prior state conviction arose must have included as an element the victim's status as a

minor" for the conviction to fall within the scope of any of the three categories in § 2252(b)(2)). The Sixth Circuit has reached this conclusion most explicitly, although it did so because it found that another panel of that court had "already considered the proper construction of the statutory language at issue," and that that prior decision bound the current panel, even though the earlier opinion did not engage in any express analysis of the statutory language. *United States v. Mateen*, 739 F.3d 300, 304-05 (6th Cir. 2014) (citing *United States v. Gardner*, 649 F.3d 437 (6th Cir. 2011)), *reh'g en banc granted, opinion vacated* (Apr. 9, 2014). We are not compelled to follow such unexplored assumptions in coming to our conclusion here.[4]

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4. In *United States v. Beardsley*, 691 F.3d 252 (2d Cir. 2012), this Court commented that for a state-law conviction to trigger the analogous sentencing enhancement under 18 U.S.C. § 2252A(b)(1), "the statute underlying the prior conviction must itself relate to sexual abuse of minors for the enhancement to apply." *Id.* at 269. However, this statement is dictum and does not bind this panel. At issue in *Beardsley* was whether to take a categorical approach in determining whether a state-law conviction for endangering the welfare of a child was a predicate offense under § 2252A(b)(1) sentencing enhancement. Beardsley's actual conduct underlying the conviction constituted "abusive sexual conduct involving a minor," so that case turned on the scope of the conduct prohibited by the statute, not whether the conviction must involve a minor. *See id.* at 256. This understanding of *Beardsley* was confirmed in a recent decision of this Court, in which we stated that "[w]e did not expressly identify in *Beardsley* that the three types of predicate offenses are distinct, nor did we address whether the phrase 'involving a minor or ward' modifies only 'abusive sexual conduct' as other Courts of Appeals have done." *United States v. Barker*, 723 F.3d 315, 322 (2d Cir. 2013) (per curiam). Thus, we are not bound by *Beardsley*'s suggestion that "involving a minor" modifies each term.

Appendix C

Resisting the conclusion that Congress intended to treat state and federal predicate crimes similarly, Lockhart argues that the relevant pattern in § 2252(b)(2) is instead that Congress limited other state-law predicate offenses in this and related sentencing provisions to those involving children. *See, e.g.*, 18 U.S.C. § 2252(b)(2) (including state offenses relating to "child pornography"); 18 U.S.C. § 2251(e) (including state offenses relating to "sex trafficking of children"). According to Lockhart, then, not reading "aggravated sexual abuse" and "sexual abuse" to be limited to those convictions "involving a minor or ward" would create an inconsistency among the treatment of different state-law offenses. While there is some logic to this position, we do not think that this theory is more reasonable than the assumption that Congress would intend for courts to treat prior sexual abuse convictions similarly, regardless of whether the conviction was under federal or state law. Lockhart's interpretation is further undermined when one compares the language used to describe the universe of state sexual abuse convictions in § 2252(b)(2) with the federal analogs in 18 U.S.C. §§ 2241 (aggravated sexual abuse), 2242 (sexual abuse), and 2243 (sexual abuse of a minor or ward). Under the federal statutory scheme, adult and minor victims are included under the first two provisions, while § 2243 covers only minors and wards. Although the language used in § 2252(b)(2) is not identical to these statutory titles, it nonetheless suggests that Congress intended to impart a similar structure to state-law predicate offenses for purposes of this sentencing enhancement, and the pattern Lockhart perceives among other state-law offenses does not necessarily apply here.

We furthermore note that the brief legislative history of this provision does not alter our conclusion. *See* S. Rep. No. 104-358, 104th Cong., 1996 WL 506545, at *9 (1996) (stating only that the penalties under §§ 2252 and 2252A would provide for a mandatory minimum sentence for "a repeat offender with a prior conviction under chapter 109A or 110 of title 18, or under any State child abuse law or law relating to the production, receipt or distribution of child pornography"). Likewise, resort to the rule of lenity is inappropriate where, as here, "the statutory text allows us to make far more than 'a guess as to what Congress intended.'" *DePierre v. United States*, 131 S. Ct. 2225, 2237, 180 L. Ed. 2d 114 (2011) (quoting *Reno v. Koray*, 515 U.S. 50, 65, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995)).

Accordingly, because we conclude that "involving a minor or ward" modifies only "abusive sexual conduct" and not "sexual abuse" or "aggravated sexual abuse," we find that the district court correctly applied § 2252(b)(2)'s sentencing enhancement in light of Lockhart's prior conviction for sexual abuse.

Conclusion

For the foregoing reasons, the judgment and sentence of the district court are affirmed.

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED FEBRUARY 13, 2013

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA

v.

AVONDALE LOCKHART

JUDGMENT IN A CRIMINAL CASE

Case Number: 11-CR-0231-SJ

USM Number: 78979-053

Mildred Whalen, One Pierrepont Plz, Bklyn NY 11201
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) two of a two-count indictment.

☐ pleaded nolo contendere to count(s) which was accepted by the court. _____

☐ was found guilty on count(s) after a plea of not guilty.
The Court accepts the plea taken before Magistrate Judge Go on 3/6/2012.

Appendix D

The defendant is adjudicated guilty of these offenses:

Title & Section
18USC2252(a)(4) and (b)(2)

Nature of Offense
Possession of child pornography

Offense Ended
7/13/2011

Count
2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) all open ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Appendix D

2/1/2013
Date of Imposition of Judgment

/s/ (SJ)
Signature of Judge

STERLING JOHNSON, JR., U.S.D.J.
Name of Judge Title of Judge

2/11/2013
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One hundred twenty (120) months.

☑ The court makes the following recommendations to the Bureau of Prisons:

Designation to a Care Level III medical facility close to the state of Florida. Defendant is also to receive mental health treatment and treatment for sexual disorders.

* * *

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 4/1/2013

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Ten (10) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

* * *

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

* * *

Appendix D

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment; notification is not possible, then within forty eight hours after such change;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix D

SPECIAL CONDITIONS OF SUPERVISION

- the defendant is not to use a computer, Internet capable device, or similar electronic device to access pornography or any kind while in sex offender treatment, unless permitted by the sex offender treatment program. The term "pornography" shall include images or video(s) of adults or minors engaged in "sexually explicit conduct" as that term is defined in Title 18, United States Code, Section 2256(2). The defendant shall also not use a computer, Internet capable device or similar electronic device to view images of naked children. The defendant shall not use his/her computer to view pornography or images of naked children stored on related computer media, such as CD's or DVD's, and shall not communicate via his/her computer with any individual or group who promotes the sexual abuse of children. This condition is recommended due to the conduct comprising the instant offense, and the type of treatment in which the defendant will be engaged during his term of supervised release. Specifically, while participating in sex offender specific mental health treatment, viewing pornography of any kind, including naked children, can be detrimental to and undermine the objectives of treatment. Moreover, should sex offender specific mental health treatment be paired with therapeutic polygraph examinations, viewing pornography of any kind, including images of naked children, can interfere with the testing objectives, eliciting inconclusive test results, again undermining rehabilitation and treatment, which are fundamental goals of sentencing and supervised release. Therefore, while in sex offender mental health treatment, if it is a condition of treatment

that the defendant not view adult pornography, i.e., images or video(s) of adults engaged in "sexually explicit conduct" as that term is defined in Title 18, United States Code, Section 2256(2) or naked children, if the defendant views such pornography or images of naked children it will be considered a violation of the conditions of his sex offender mental health treatment and his supervised release. The viewing of child pornography at any time during supervised release will be considered a violation of supervised release as well as a violation of law.

- the defendant shall also cooperate with the U.S. Probation Department's Computer and Internet Monitoring program. Cooperation shall include, but not be limited to, identifying computer systems, Internet capable devices, and/or similar electronic devices the defendant has access to, and allowing the installation of monitoring software/ hardware on said devices, at the defendant's expense. The defendant shall inform all parties that access a monitored computer, or similar electronic device, that the device is subject to search and monitoring. The defendant may be limited to possessing only one personal internet capable device, to facilitate our department's ability to effectively monitor his/her Internet related activities. The defendant shall also permit random examinations of said computer systems, Internet capable devices, similar electronic devices, and related computer media, such as CD's, under his/her control.

Defendant shall participate in a mental health treatment program, which may include participation in a treatment program for sexual disorders, as approved by the

Probation Department. The defendant shall contribute to the cost of such services rendered and/or any psychotropic medications prescribed to the degree he is reasonably able, and shall cooperate in securing any applicable third-party payment. The defendant shall disclose all financial information and documents to the Probation Department to assess his ability to pay. As part of the treatment program for sexual disorders, the defendant shall participate in a polygraph examination(s) to obtain information necessary for risk management and correctional treatment.

Defendant shall not associate with any child(ren) under the age of 18, unless a responsible adult is present and he has prior approval from the Probation Department.

Defendant shall comply with the sex offender registration requirements mandated by law.

The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found; the search must also be conducted in a reasonable manner and at a reasonable time; failure to submit to a search may be grounds for revocation; the defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

If deported, the defendant may not re-enter the United States illegally.

Appendix D

The defendant shall not possess a firearm; ammunition, or destructive device.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$

* * *

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

* * *

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Appendix D

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

(a) a Hewlett Packard g60 laptop computer; and (b) a Toshiba 500 GB external hard drive.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

ADDITIONAL FORFEITED PROPERTY

SEE ATIACHED FINAL ORDER OF FORFEITURE; (a) a Hewlett Packard g60 laptop computer; and (b) a Toshiba 500 GB external hard drive.

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

AVONDALE LOCKHART,

Defendant.

FINAL ORDER OF FORFEITURE

CR-11-231 (SJ)

WHEREAS, on or about March 6, 2012, the defendant, AVONDALE LOCKHART, entered a plea of guilty to Count Two of an Indictment charging a violation of 18 U.S.C. § 2252(a)(4)(B); and

WHEREAS, the defendant consented to the forfeiture of all his right, title and interest in the following items: (a) a Hewlett Packard g60 laptop computer; and (b) a Toshiba 500 GB external hard drive, seized from the defendant (the "Forfeited Property"), pursuant to 18 U.S.C. § 2253, as property that constitutes (a) any visual depiction described in 18 U.S.C. §§ 2251, 2251A, 2252, 2252A, 2252B or 2260, and any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped and received in violation of the offenses charged; (b) any property, real and personal, constituting or traceable to gross profits and other proceeds obtained from such

offenses; and/or (c) any property, real and personal, used or intended to be used to commit or to promote the commission of said offenses or property traceable to such property, as well as all substitute assets, pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p);

WHEREAS, on or about March 21, 2012, this Court entered a Preliminary Order of Forfeiture, pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p), requiring the defendant to forfeit all his right, title and interest in the Forfeited Property;

WHEREAS, legal notice of forfeiture was published in this district on the official government website, www.forfeiture.gov, for at least thirty (30) consecutive days beginning on April 17, 2012 and ending on May 16, 2012; and

WHEREAS, no third-party has filed with the Court any petition or claim in connection with the Forfeited Property, and the time to do so under 21 U.S.C. § 853(n)(2) has expired;

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED, on consent as follows:

1. Pursuant to Fed. R. Crim. P. 32.2(c)(2), the Preliminary Order of Forfeiture previously entered by this Court is hereby made a Final Order of Forfeiture.

2. All right, title and interest in the Forfeited Property is hereby forfeited to the United States pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p).

3. The United States Marshals Service and/or the United Postal Investigation Service and its duly authorized agents and contractors are hereby directed to dispose of the Forfeited Property in accordance with all applicable laws and rules.

4. The United States District Court for the Eastern District of New York shall retain jurisdiction in this case for the purpose of enforcing this Order.

5. Pursuant to Fed. R. Crim. P. 32.2(b)(4)(a) and (c), this Final Order shall become final as to the defendant at the time of sentencing and shall be made part of the defendant's sentence and included in the judgment of conviction.

6. The Clerk of the Court is directed to send, by inter-office mail, four certified copies of this Final Order to the United States Attorney's Office, Eastern District of New York, ATTN: Maritza Arroyo, FSA Paralegal, 271 Cadman Plaza East, 7th Floor, Brooklyn, New York 11201.

Dated: Brooklyn, New York
Feb. 1, 2013

SO ORDERED:

_____

HONORABLE STERLING JOHNSON, JR.
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

APPENDIX E — INDICTMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED MARCH 24, 2011

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR11-231
(T. 18, U.S.C., §§ 2252(a)(2), 2252(a)(4)(B), 2252(b)(1), 2252(b)(2), 2253 and 3551 *et seq.*; T. 21, U.S.C., § 853(p))

UNITED STATES OF AMERICA

- against -

AVONDALE LOCKHART,

Defendant.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE
(Attempted Receipt of Child Pornography)

1. In or about and between June 2010 and July 2010, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant AVONDALE LOCKHART did knowingly and intentionally attempt to receive one or more visual depictions using a means and facility of interstate and foreign commerce, and which visual depictions had been

mailed, and shipped and transported in and affecting interstate and foreign commerce, by any means including by computer, the production of such visual depictions having involved the use of one or more minors engaging in sexually explicit conduct, and such visual depictions were of such conduct.

(Title 18, United States Code, Sections 2252(a)(2), 2252(b)(1) and 3551 *et seq.*)

COUNT TWO
(Possession of Child Pornography)

2. On or about July 13, 2011, within the Eastern District of New York, the defendant AVONDALE LOCKHART did knowingly and intentionally possess matter containing one or more visual depictions, to wit: videos and images contained in computer files on a Hewlett Packer g60 laptop computer and a Toshiba 500 GB USB external hard drive, which visual depictions had been mailed, and shipped and transported using a means and facility of interstate and foreign commerce, and in and affecting interstate and foreign commerce, and which were produced using materials which had been mailed and so shipped and transported, by any means including by computer, the production of such visual depictions having involved the use of one or more minors engaging in sexually explicit conduct, and such visual depictions were of such conduct.

(Title 18, United States Code, Sections 2252(a)(4)(B), 2252(b)(2) and 3551 *et seq.*)

Appendix E

CRIMINAL FORFEITURE ALLEGATION

3. The United States hereby gives notice to the defendant that, upon his conviction of any of the charged offenses, the government will seek forfeiture in accordance with Title 18, United States Code, Section 2253, of (a) any visual depiction described in Section 2251, 2251A, 2252, 2252A, 2252B or 2260 of Title 18, United States Code, or any book, magazine, periodical, film, videotape, and other matter produced, transported, mailed, shipped and received in violation of such sections; (b) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from the offense(s) of conviction; and (c) any property, real or personal, used or intended to be used to commit or to promote the commission of the offense(s) of conviction, or any property traceable to such property, including, but not limited to, one Hewlett Packer g60 laptop computer and all hard drives included therein and one Toshiba 500 GB USB external hard drive.

4. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 2253(b), to seek forfeiture of any other property of the defendant up to the value of the forfeitable property described in this forfeiture allegation.

(Title 18, United States Code, Section 2253; Title 21, United States Code, Section 853(p))

APPENDIX F — TRANSCRIPT OF SENTENCING IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED FEBRUARY 1, 2013

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

11-CR-231

UNITED STATES OF AMERICA,

Plaintiff,

-against-

AVONDALE LOCKHART

Defendant.

United States Courthouse
Brooklyn, New York

February 1, 2013
9:30 a.m.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE STERLING
JOHNSON, JR., UNITED STATES DISTRICT
SENIOR JUDGE

* * *

[2] THE COURT CLERK: United States of America v. Lockhart.

THE COURT: Note your appearances.

MS. MELENDEZ: Good morning, your Honor.

Maria Cruz Melendez for the government. With me here from the Probation Department is Mary Ann Betts.

MS. BETTS: Good morning, your Honor.

MS. WHALEN: Good morning, your Honor.

Federal Defenders of New York by Mildred Whalen for Mr. Lockhart.

THE COURT: Mr. Lockhart, have you read and discussed the presentence report with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Are you ready for sentence?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Let me address some of the legal matters that have been presented to me by the lawyers.

First order of business, let the record reflect that I am in possession of a transcript of a plea by this defendant before Magistrate Judge Go on March 6, 2012, and I accept the plea.

Appendix F

Secondly, I like to state I adopt the finding in the presentence report made by the Probation Department.

One of the main objections by the defendant is the issue of the mandatory minimum that the government says is [3] applicable in this situation, and Ms. Whalen, as usual, is a good lawyer and puts in some very, very good papers. You state or she states, basically, that 18 2252(b)(2) is inapplicable because she states that defendant did not have sexual conduct involving a minor; is that correct?

MS. WHALEN: The prior conviction is not for sexual conduct involving a minor.

THE COURT: And I'm ruling that the plain reading of the statute negates that particular position. The defendant was convicted in state court. When was it, 2000 --.

MS. MELENDEZ: 1999, your Honor.

THE COURT: In 1999, and the situation was where he pinned down a former girlfriend and attempted to place his penis in her vagina. He was convicted of that and received five years probation. That fits within that part of the statute that speaks of a state conviction for aggravated sexual abuse.

Secondly, there is an Eighth Amendment claim.

MS. WHALEN: Yes, Your Honor.

THE COURT: And I will deny that because I think that the statute created by Congress has a legitimate purpose, and it's not unconstitutional.

The guideline range in this particular case is 78 to 97 months. The maximum statute calls for 240 months, but the mandatory minimum, which is triggered by the aggravated [4] sexual abuse after a conviction, is 120 months, which is below the 240 months.

I think, thirdly, Ms. Whalen raises the issue of United States v. Dorvee. This is a different kettle of fish. In Dorvee, the court referred to a situation where the enhancement created a situation where the sentence was greater than the mandatory minimum. In this situation, there is no exceeding the mandatory minimum, therefore, I hold that Dorvee does not apply.

Now, any other objection, Ms. Whalen?

MS. WHALEN: No, Your Honor.

THE COURT: Now, do you agree with the guideline range?

MS. WHALEN: Your Honor, I object to the guideline range as set forth.

THE COURT: I understand that and that's on the record.

MS. WHALEN: But given the court's analysis, I understand that the applicable guideline range would be 120 months.

THE COURT: Okay. Now I will ask Mr. Lockhart, do you wish to say something?

THE DEFENDANT: I just want to say I'm sorry for what I did. I didn't mean to hurt anyone. I was recovering from my kidney transplant and I bought a computer, my first [5] computer, and I ended up on one of those sites. I'm sorry.

THE COURT: Okay. Ms. Whalen?

MS. WHALEN: Your Honor, I think that the mandatory minimum sentence of 120 months would be more than sufficient to achieve the goals of sentencing. I would like to address the medical issues after or I can address them now, if the court wants, in terms of surrender, and my conversations with the Bureau of Prisons about taking care of Mr. Lockhart's medical condition.

THE COURT: Okay. I received something from the government in which -- and maybe -- is it Ms. Melendez?

MS. MELENDEZ: Yes, Your Honor?

THE COURT: I haven't messed your name up yet.

MS. MELENDEZ: Well, technically, your Honor, it is Cruz Melendez, but I answer by Ms. Melendez as well.

THE COURT: Well, I messed it up. Welcome to the club.

Ms. Cruz Melendez sent me a letter. I assume that you got a copy of it. I think it was dated January 17th.

MS. WHALEN: Yes, Your Honor. And when we were last before the court on the 18th, I asked for an opportunity to speak with the Bureau of Prisons about the issue of a lack of a drug called Myfortic which prevents rejection of a transplanted kidney. So Ms. Cruz Melendez provided me Joyce Horikawa's telephone number at the Bureau of Prisons. Ms. [6] Sullivan actually wrote the letter that is attached to the government's January 17th letter, but she is the regional director, and Ms. Horikawa is above her in terms of the Bureau of Prisons.

So when I talked to Ms. Horikawa, I was talking to her about whether or not we can have an examination, because the doctor in the Bureau of Prisons has to actually prescribe the drugs for Mr. Lockhart. So I was asking if there was a way we could arrange for him to appear at the prison, but not actually be designated until they got his medication. What Ms. Horikawa said is that she said that once we receive notification of Mr. Lockhart's designation - and I think everybody agrees that he should self-surrender - she told me that based on his records, he will be designated to what is called a Category Care Level Three Bureau of Prisons in terms of medicine.

THE COURT: Is that Butner?

MS. WHALEN: Either could be Butner. I think it could be Devins. I think it could be Minnesota. There are a couple of them nationwide. She said that once we were notified of the actual designation, we should then forward a complete set of my client's medical records to her. She would then send them to the regional director.

She also said that given the fact that some of his medication was not on formulary, they would allow him to [7] bring a seven-day supply of medication. She said that they now had a 36-hour turnaround for non-formulary medication, but a seven-day supply would cover him in case there were any delays. Then we would also provide them with the name and the contact number of his treating physician to get additional information.

She suggested a Monday, not this Monday, but in the future a Monday surrender date.

THE COURT: I'm going to allow him to surrender, and it will probably be a couple of months.

MS. WHALEN: Okay. I think my understanding is designations are usually taking like one to two months. And since we have to give them the additional medical records, I would ask -- we'll have everything ready to go as soon as the designation is made. So maybe like two and a half months and then we can have two weeks afterwards?

MS. BETTS: The Probation Department would like to state we've had an ongoing problem in this district and other federal courts of suicides after sentencing, but before designation for sex offenders. We'll do everything in our power to expedite all the documents and the judgment and everything sent to the Bureau of Prisons official designation ASAP, and that designation could be as brief as possible because of problems with depression and suicide potential.

MS. WHALEN: Mr. Lockhart is in counseling and he's [8] under electronic monitoring. He lives with another individual, so he's not someone who has extended periods on his own. He's been in counseling, both religious and mental health, addressing this issue. So an expedited date is fine. It's just that if we can set it out for a month.

THE COURT: I will set it out for at least two months, and I would suggest that you work with Ms. Cruz Melendez and Ms. Betts, and we can work something out.

MS. WHALEN: Okay.

THE COURT: I agree that I think the mandatory minimum is sufficient, after considering the factors in 3553(a). So I will sentence the defendant to the custody of the Attorney General or his duly authorized representative for a period of 120 months. $100 special assessment.

What is the supervised release?

MS. BETTS: Any amount of years to life. We had recommended ten.

THE COURT: Ten years supervised release.

I'm also going to recommend mental health and treatment for the defendant while in the custody of the Bureau of Prisons. And as a condition of his supervised release, the Probation Department asks that I include in the J & C a treatment program for sexual disorders, and recommend that the defendant participate in the polygraph examination to obtain information necessary for risk management and [9] correctional treatment.

The defendant will not associate with any children under 18, unless a responsible adult is present and he has prior approval from the Probation Department.

The defendant must register as a sex offender.

MS. MELENDEZ: Your Honor, the government asks that as part of the defendant's sentence, the court pronounce the forfeiture of particular items that contain child pornography, being a Hewlett Packard G-60 laptop computer, and Toshiba 500 gigabyte external hard drive that were seized from the defendant.

THE COURT: Any objection?

MS. WHALEN: We consented to the seizure of those items or the forfeiture of those items.

THE COURT: Okay. They will be forfeited.

Do I have to sign an order?

MS. MELENDEZ: Yes, your Honor. I believe an order was provided, but I have a copy here. We ask that the order be attached to the J & C.

THE COURT: What we can do is to -- today's the 1st, right?

MS. MELENDEZ: Yes, your Honor.

MS. BETTS: Yes.

THE COURT: What we can do is make a copy of this, Ana, and give a copy to Ms. Whalen and to Ms. Cruz Melendez, [10] and then attach a copy to the J & C.

Are there any open counts?

MS, MELENDEZ: Yes, Your Honor, and the government would move to dismiss those counts.

THE COURT: They will be dismissed.

MS. BETTS: The Probation Department would want to inquire with the court if the court would consider a special condition that the defendant not use a computer internet capable device to access pornography of any kind. The definition of pornography being defined in Title 18 United States Code, Section 2256(2), and shall cooperate

with the Probation Department Computer and Internet Monitoring Program to remotely access any computer device.

THE COURT: As a condition of supervised release?

MS. BETTS: Correct.

THE COURT: I will make that recommendation and put it in the J & C.

MS. WHALEN: Your Honor, I haven't done the research with respect to the regular pornography, whether or not that's a constitutional condition.

THE COURT: I think the recommendation is for child pornography. It didn't say regular pornography.

MS. BETTS: It was including regular pornography of any kind.

THE COURT: But constitutionally he can see regular [11] pornography, can't he?

MS. BETTS: It's opposed to treatment plans for sex offender treatment. It doesn't support the treatment plans for sex offender mental health treatment.

MS. WHALEN: If that's a condition of the mental health treatment, maybe we can make it -- if the mental health treatment plan requires no pornography, then that could be a condition of his supervision, because that would be the condition of the mental health treatment?

MS. BETTS: That's feasible, yes.

THE COURT: Will you draft some language, you and Ms. Whalen, and give it to Ana so that she can include it in the J & C?

MS. BETTS: Yes.

MS. WHALEN: So the surrender date would be?

THE COURT: And you will be in touch with the government, when I say the government, I mean Ms. Cruz Melendez, with the prosecutor, and probation.

MS. WHALEN: As well as Ms. Horikawa in the Bureau of Prisons.

THE COURT: Okay.

THE COURT CLERK: April 1st surrender date by I believe it's noon. And it's going to be surrender to the institution?

[12] MS. WHALEN: It will be surrender to the institution.

THE COURT: Okay. Any open counts?

MS. MELENDEZ: Not any more, your Honor. The government moved to dismiss the counts. I believe your Honor ordered that they be dismissed.

THE COURT: Okay. Have a good day.

MS. MELENDEZ: Thank you, Judge.

MS. WHALEN: Thank you.

(The sentencing is concluded.)

No. 14-8358

Supreme Court, U.S.
FILED
JUL 24 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AVONDALE LOCKHART,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Section 2252(b)(2) of Title 18, U.S.C., requires a District Court to impose a sentence of at least ten years of imprisonment for the offense of possessing child pornography if the defendant has a qualifying prior conviction, including a prior conviction "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward[.]"

The question presented is whether § 2252(b)(2)'s mandatory minimum penalty is triggered by a prior state conviction "relating to" "aggravated sexual abuse" or "sexual abuse" even though the conviction did not "involv[e] a minor or ward."

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS.... ii

TABLE OF CITED AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION.. 1

STATUTORY PROVISIONS INVOLVED. 1

STATEMENT OF THE CASE 2

A. Introduction..... 2

B. Factual Background..... 4

C. District Court Proceedings..... 5

D. The Second Circuit's Decision..... 6

SUMMARY OF ARGUMENT... 8

ARGUMENT.. .... .11

I. The phrase "involving a minor or ward" in 18 U.S.C. § 2252(b)(2) modifies the entire integrated list of closely related, overlapping, and parallel terms—"aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct." 11

Table of Contents

Page

A. The plain meaning of the statutory language, read in light of the series-qualifier principle and this Court's precedents, is that "involving a minor or ward" modifies all three state-law predicates 11

1. The series-qualifier principle applies because "involving a minor or ward" makes sense with all three terms in the series.. 13

2. The series-qualifier principle also applies because the phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct" constitutes an integrated list of related elements... 15

3. Applying the series-qualifier principle here comports with ordinary English usage. 19

4. Had Congress intended "involving a minor or ward" to modify only "abusive sexual conduct," the statute would read differently 20

B. The statutory context, structure, and history confirm that "involving a minor or ward" modifies the entire series of state-law predicates ..... .22

Table of Contents

Page

1. Convictions for several enumerated federal offenses constitute § 2252(b)(2) predicates, but state-law convictions for the same conduct qualify only if they involve children ... .22

2. Congress sensibly decided to treat federal and state convictions differently.. 27

C. Petitioner's natural reading of the statute comports with the contemporary understanding of Congress and the Department of Justice 29

D. The Second Circuit's decision is wrong ...33

1. The court relied on the false "assumption" that Congress intended to treat prior federal and state convictions equally.. 33

2. The court relied incorrectly on the rule against surplusage.. 34

3. The court relied on a presumed structural parallel that does not exist..... 35

Table of Contents

Page

II. If an ambiguity remains, the rule of lenity resolves it in petitioner's favor. 39

A. The rule of lenity requires that ambiguous criminal laws be interpreted to favor the defendant. .... .39

B. Section 2252(b)(2) should not be employed to increase petitioner's sentence because the government has not shown that the statute's recidivist enhancement unambiguously applies to him..... 41

CONCLUSION 43

APPENDIX.. .... .1a

TABLE OF CITED AUTHORITIES

Page

CASES

Acosta v. Ashcroft,
341 F.3d 218 (3d Cir. 2003) 27

Arlington Central Sch. Dist. Bd. of Educ. v. Murphy,
548 U.S. 291 (2006).... .... .34

Bailey v. United States,
516 U.S. 137 (1995)..... 11

Barnhart v. Thomas,
540 U.S. 20 (2003)..... 19

Bifulco v. United States,
447 U.S. 381 (1980)..... 41

Chickasaw Nation v. United States,
534 U.S. 84 (2001). 34

Cleveland v. United States,
531 U.S. 12 (2000)... 39

Cortez Byrd Chips v. Bill Harbert Constr. Co.,
529 U.S. 193 (2000).... .... .27

Davis v. Michigan Dep't of Treasury,
489 U.S. 803 (1989)..... .... .22

Cited Authorities

Page

Dean v. United States,
556 U.S. 568 (2009). 42

Flores-Figueroa v. United States,
556 U.S. 646 (2009)..... .... .11

Hughey v. United States,
495 U.S. 411 (1990).... 40

Jama v. Immigration and Customs Enf't,
543 U.S. 335 (2005) 12, 15

Jones v. United States,
529 U.S. 848 (2000) .... .11

Kaiser Aluminum & Chem. Corp. v. Bonjorno,
494 U.S. 827 (1990)... 30-31

Koon v. United States,
518 U.S. 81 (1996). .... .42

Marx v. Gen. Revenue Corp.,
133 S. Ct. 1166 (2013)..... .... .34

McBoyle v. United States,
283 U.S. 25 (1931)..... 40

Mississippi ex rel. Hood v. AU Optronics Corp.,
134 S. Ct. 736 (2014). 21

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Page

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504 U.S. 374 (1992). 17

Nobelman v. American Sav. Bank,
508 U.S. 324 (1993)... 19-20

Paroline v. United States,
134 S. Ct. 1710 (2014) 12, 14, 16

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444 U.S. 37 (1979)... 16

Porto Rico Ry., Light & Power Co. v. Mor,
253 U.S. 345 (1920). 12, 13, 14, 16

Rewis v. United States,
401 U.S. 808 (1971).. 39

Roadway Express v. Piper,
447 U.S. 752 (1980).... 29

Sandifer v. United States Steel Corp.,
134 S. Ct. 870 (2014)... 16

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004)..... 38

United States v. Barker,
723 F.3d 315 (2d Cir. 2013) 17, 18, 36

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Page

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404 U.S. 336 (1971). .... *passim*

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435 U.S. 110 (1978)..... .... .32

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543 U.S. 220 (2005) ... .42

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511 U.S. 39 (1994).. .... .40, 41

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480 F.3d 341 (5th Cir. 2007) 16, 36

United States v. Johnson,
135 S. Ct. 2551 (2015)... 28

United States v. Laureys,
653 F.3d 27 (D.C. Cir. 2011).... 35

United States v. Olano,
507 U.S. 725 (1993). 18

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247 F.3d 1158 (11th Cir. 2001)..... ...17, 18, 28

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503 U.S. 291 (1992).... 41

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322 F.3d 443 (7th Cir. 2003) 24-25

United States v. Santos,
553 U.S. 507 (2008). 39

United States v. Shrader,
675 F.3d 300 (4th Cir. 2012). 35

United States v. Sinerius,
504 F.3d 737 (9th Cir. 2007) 16, 36

United States v. Sonnenberg,
556 F.3d 667 (8th Cir. 2009) ..... .17, 36, 37

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661 F.3d 194 (4th Cir. 2011)..... 7

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344 U.S. 218 (1952)..... 40

United States v. Vado,
2015 WL 1611337 (S.D.N.Y. Apr. 10, 2015) 18, 35

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18 U.S. (5 Wheat.) 76 (1820) 40, 41

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513 U.S. 64 (1994)..... .... .38

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES

4 U.S.C. § 4 ..... .19

18 U.S.C. §§ 1461–66 23

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18 U.S.C. § 1468 .... .23

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18 U.S.C. § 2241 ....8, 36, 37, 38

18 U.S.C. § 2242 ....8, 36, 37, 38

18 U.S.C. § 2243 ....8, 36, 37

18 U.S.C. § 2244 .... .36, 37

18 U.S.C. § 2251 ....2, 26

18 U.S.C. § 2252 .... *passim*

18 U.S.C. § 2252A 2, 10, 26, 32

18 U.S.C. § 2259 ....14, 16

18 U.S.C. § 3231 1

Page

18 U.S.C. § 3553(a)..... 42

28 U.S.C. § 1291..... 1

28 U.S.C. § 1254(1).... 1

Fed. R. Crim. P. 52(b)..... .... .18

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OPINIONS BELOW

The Second Circuit's opinion is reported at 749 F.3d 148 and appears at JA 9–24. The transcript of petitioner's sentencing proceeding in the Eastern District of New York appears at JA 43–55.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on February 13, 2013. JA 25. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, issued its opinion on May 15, 2014, and denied rehearing and rehearing en banc on October 16, 2014. JA 8–9. A timely petition for certiorari was filed on January 14, 2015, and granted on May 26, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns § 2252(b)(2) of Title 18, U.S.C., which provides in relevant part:

> Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if ... such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the

> production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

Section 2252 is reproduced in full, along with the other relevant statutory provisions, 18 U.S.C. §§ 2251 and 2252A, in the statutory appendix annexed to this brief. App. 1a–20a.

STATEMENT OF THE CASE

A. Introduction

Federal criminal law prohibits the production, distribution, receipt, and possession of material showing minors engaging in sexually explicit conduct, commonly known as child pornography. *See* 18 U.S.C. §§ 2251, 2252, 2252A. Simple possession of such material, the least serious federal crime relating to child pornography, ordinarily carries no minimum term of imprisonment and a ten-year maximum. *See* § 2252(b)(2). But § 2252(b)(2) mandates a prison term of not less than ten years (and doubles the maximum term to twenty years) for offenders who have certain prior convictions, including "a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography."

Petitioner pleaded guilty in federal court to one count of possessing child pornography. He had no prior

conviction "involving a minor or ward." But the District Court concluded that § 2252(b)(2)'s enhanced penalties nevertheless applied because petitioner had a decade-old New York State conviction for sexually abusing his 53-year-old girlfriend, for which he received probation. The District Court therefore sentenced petitioner to the ten-year mandatory minimum term. The Court of Appeals affirmed, holding that the phrase "involving a minor or ward" modifies only the immediately preceding phrase "abusive sexual conduct."

This Court should reverse. The most natural reading of the statutory language, construed in light of this Court's precedents, the statutory context, its overall structure, and its history, is that the three enumerated categories of wrongful sexual behavior in § 2252(b)(2)—"aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct"—constitute a single, integrated list of closely related and overlapping terms, all introduced by the broadening term "relating to." The modifying phrase "involving a minor or ward" thus applies to the entire series. This interpretation accords with ordinary English usage and represents a straightforward application of the familiar rule of syntax known as the "series-qualifier" principle. Petitioner's reading finds additional support in the Department of Justice's own contemporaneous understanding of the statutory text, which Congress shared. At the very least, the statute is ambiguous and therefore must be construed in favor of lenity.

B. Factual Background

In 2010, federal law enforcement agents targeted petitioner in a sting operation. Immigration and Customs Enforcement agents and United States Postal Inspectors mailed a letter to petitioner's home in Brooklyn, New York, inviting him to purchase child pornography through a government-run website or mail-order catalog. Petitioner ordered six DVDs of children engaged in sexually explicit conduct, paying with a $125 money order. When petitioner accepted delivery of a package said to contain the videos, agents executed a warrant to search his home. They recovered nine videos and numerous images containing child pornography from the hard drive of petitioner's laptop computer. *See* Presentence Investigation Report ("PSR") ¶¶ 3–23.

Petitioner was 46 years old when arrested. He was born in Dominica and has lived in the United States Virgin Islands and the continental United States as a lawful permanent resident since he was seven years old. He lived principally in the New York City area and worked as an aerobics instructor and bus driver until kidney disease, caused by years of heavy drinking, left him disabled. In 2007, petitioner underwent a kidney transplant and was homebound during his convalescence. Though he had maintained several long-term romantic relationships with women in the past, petitioner's illness kept him from engaging in sexual activity. While recuperating at home, petitioner bought a computer, his first, and grew addicted to readily available Internet pornography. Initially, petitioner viewed only adult pornography, but later began viewing child pornography as well. *See* PSR ¶¶ 53–64, 67–69, 74–81. Nonetheless, petitioner has

never had sexual contact with a child. And a psychiatric evaluation prepared in connection with his sentencing concluded that petitioner was "not a pedophile, ... nor does he have any other paraphilia or hypersexual disorder." Indeed, the evaluating psychiatrist opined that petitioner "is aging and has severe kidney disease, both of which reduce his sexual drive, and ... his risk of another sexual crime is remote." PSR ¶ 73.

C. District Court Proceedings

Petitioner pleaded guilty in the Eastern District of New York to simple possession of child pornography, in violation of § 2252(a)(4)(B). Without regard to any mandatory minimum, the PSR calculated a Sentencing Guidelines range of imprisonment of 78–97 months. PSR ¶ 88. But the PSR also noted that in 2000 petitioner had pleaded guilty to sexual abuse in the first degree, in violation of N.Y. Penal Law § 130.65(1), which provides: "A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact ... [b]y forcible compulsion." JA 11. According to the PSR, an arrest report in that case alleged that petitioner pinned down his 53-year-old girlfriend and attempted to penetrate her. The state court sentenced petitioner to five years' probation, which he successfully completed. PSR ¶¶ 47–48. The PSR concluded that petitioner's New York State conviction for sexual abuse was a "conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," subjecting him to a ten-year mandatory minimum prison sentence. *See* PSR ¶ 87 (citing § 2252(b)(2)).

At his federal sentencing, petitioner objected to the application of the ten-year mandatory minimum, arguing that his New York State conviction was not a qualifying predicate because it did not "involv[e] a minor." JA 45. The District Court (Johnson, J.) disagreed, ruling that "the plain reading of the statute negates that particular position" because petitioner's offense "fits within that part of the statute that speaks of a state conviction for aggravated sexual abuse." JA 45. The court sentenced petitioner to 120 months. JA 27.

D. The Second Circuit's Decision

The Court of Appeals (Katzmann, C.J., joined by Straub and Lohier, JJ.) affirmed. JA 9–24. The court held that the phrase "involving a minor or ward" modifies only "abusive sexual conduct," so that a conviction under state law "relating to" "aggravated sexual abuse" or "sexual abuse" is a § 2252(b)(2) predicate even if no minor or ward was involved.

The Second Circuit decided that the "plain meaning" of the statute "is not pellucid," and thus considered "which rule of statutory construction should inform our understanding ... : the last antecedent rule or the series qualifier canon." JA 14. "Under the last antecedent rule," as urged by respondent, "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." JA 14 (internal quotation marks omitted). In contrast, the "series qualifier canon of statutory construction," as urged by petitioner, "provides that a modifier at the beginning or end of a series of terms modifies all the terms." JA 15 (internal quotation marks omitted). The court concluded that "based

on the language and structure of this statutory phrase alone," neither canon applied "unambiguously." JA 16.

Given this "lingering ambiguity," the Second Circuit said it could not resolve the appeal "by applying the canons" to the statutory text. JA 19. Accordingly, it turned to "the remainder of § 2252(b)(2) and ... its overall scheme." JA 19. The court noted that § 2252(b)(2) provides that the enhanced penalties are also triggered if the defendant has a prior conviction for certain federal crimes, and that some of those crimes can be committed against either children or adults. The court decided that "'it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law.'" JA 20–21 (quoting *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011), and collecting cases from the Fifth, Seventh, Ninth, and Eleventh Circuits). The Second Circuit decided that "[t]his reasoning" (demonstrably incorrect, as we show *infra* pp. 22–27) "compels us to conclude that 'involving a minor or ward' modifies only prior state convictions for 'abusive sexual conduct,' not those for 'sexual abuse' or 'aggravated sexual abuse,' each of which would constitute a predicate *federal* offense if committed against an adult or a child." JA 21.

Petitioner argued that Congress, in § 2252(b)(2), as well as in §§ 2252(b)(1), 2252A(b)(1), and 2252A(b)(2), had consistently limited the state-law predicate convictions to offenses involving minors, while the federal-law predicates included the same crimes involving both adults and children. Thus, he contended, Congress likely intended the same limitation to apply to state-law convictions

for "aggravated sexual abuse" and "sexual abuse." For example, several penalty sections, including § 2252(b)(2), count among the triggering offenses prior federal convictions under chapter 71 of Title 18 (which pertains to obscene matter involving adults and children), while limiting the comparable qualifying state-law offenses to "child pornography." *See also* §§ 2252(b)(1), 2252A(b)(1), 2252A(b)(2) (same).

While acknowledging that "there is some logic to this position," the court did not find it "more reasonable than the *assumption* that Congress would intend for courts to treat prior sexual abuse convictions similarly, regardless of whether the conviction was under federal or state law." JA 23 (emphasis added).[1] The court also rejected legislative history stating that the enhancement would apply to "a repeat offender with a prior conviction under ... any State child abuse law," solely because that history was "brief." JA 24. Finally, the court rejected the rule of lenity as inapplicable. JA 24.

SUMMARY OF ARGUMENT

I. The most natural reading of "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," is that the final phrase, "involving a

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1. The court also felt that petitioner's interpretation was "undermined" because chapter 109A of Title 18 includes crimes titled "aggravated sexual abuse" (§ 2241), "sexual abuse" (§ 2242), and "sexual abuse of a minor or ward" (§ 2243), only one of which is limited to child victims. The court theorized (again incorrectly, as we show *infra* pp. 35–38) that "Congress intended to impart a similar structure" to § 2252(b)(2). For that reason, the court said, "the pattern Lockhart perceives among other state-law offenses does not necessarily apply here." JA 23.

minor or ward," modifies the entire preceding series. This interpretation comports with ordinary English usage, as reflected in the "series-qualifier" principle of syntax, which this Court has long applied to statutory lists like this one. The series-qualifier principle applies here because the final modifier, "involving a minor or ward," makes sense with all the elements of the series—a single, integrated list of closely related, parallel, and overlapping terms. Had Congress intended "involving a minor or ward" to modify only "abusive sexual conduct," the text could have been drafted to say so. Accordingly, the best reading of the language is that "involving a minor or ward" modifies the entire trilogy: "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct."

The statutory context, structure, and history reinforce this reading. They show that, in §§ 2252(b) and 2252A(b), Congress, in every other instance where it included state-law predicates, deliberately limited those predicates to crimes against minors, even though the analogous federal-law predicates include crimes against anyone. Contrary to the Second Circuit's view, that design is reasonable and administrable.

The contemporaneous understanding of both Congress and the Department of Justice further supports petitioner's reading. When the language in dispute was first added to the U.S. Code in 1996, the Senate Report made clear that it referred to prior state convictions "under any State child abuse law," not laws involving adult victims. And in 1998 the Department of Justice likewise construed the same language to cover "prior state convictions for child molestation."

The Court of Appeals, in holding that "involving a minor or ward" modifies only "abusive sexual conduct," committed a series of errors. The main rationale for the court's decision was its assertion that it would be "unreasonable" to conclude that Congress intended to treat prior federal and state convictions for the same conduct differently. JA 20. Congress intended just that. Indeed, the different treatment of federal and state predicates is an unmistakable feature of §§ 2252 and 2252A. These provisions specify that a defendant will face an enhanced sentencing range based on certain prior federal convictions but not prior state convictions encompassing the same conduct.

II. If any ambiguity remains, the rule of lenity resolves it. In light of the series-qualifier principle, this Court's precedents, and the statute's context, structure, and history, respondent's interpretation is subject at least to serious doubt. Accordingly, the rule of lenity requires that the statute be construed in petitioner's favor. That venerable rule applies with special force to a statute such as this, which imposes severely enhanced penalties, including a mandatory minimum prison sentence of ten years. The Second Circuit's interpretation of § 2252(b)(2), "compel[led]" by an unsupported "assumption" about Congress's intent, is not unambiguously correct and therefore must yield to the reading that favors leniency for petitioner.

ARGUMENT

I. The phrase "involving a minor or ward" in 18 U.S.C. § 2252(b)(2) modifies the entire integrated list of closely related, overlapping, and parallel terms—"aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct."

The plain meaning of § 2252(b)(2)'s text, read in context and in light of the overall statutory structure, is that the limiting phrase "involving a minor or ward" modifies the entire preceding series of state sex-abuse categories: "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct."

A. The plain meaning of the statutory language, read in light of the series-qualifier principle and this Court's precedents, is that "involving a minor or ward" modifies all three state-law predicates.

This Court interprets criminal statutes, like all statutes, according to their plain language and "ordinary English usage." *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009); *see, e.g.*, *Jones v. United States*, 529 U.S. 848, 855 (2000); *Bailey v. United States*, 516 U.S. 137, 144–45 (1995). The most natural reading of "a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" is that the final phrase, "involving a minor or ward," modifies all three preceding categories of state-law predicates. This reading represents a simple application of a familiar principle of syntax, sometimes called the "series-qualifier" principle:

"When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (Thomson/West 2012) ("*Reading Law*").

This Court has long read statutes in light of the series-qualifier principle. *See, e.g.*, *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920). This Court's cases have identified two textual signals indicating that the principle applies: first, "several words are followed by a clause which is applicable as much to the first and other words as to the last," *id.*; second, "[t]he modifying clause appear[s] ... at the end of a single, integrated list[.]" *Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 344 n.4 (2005). When these textual signals are present, the series-qualifier rule produces a "natural" reading. *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) ("'natural construction'") (quoting *Porto Rico Ry.*, 253 U.S. at 348). Indeed, in practice the rule simply comports with ordinary English usage. Because the series here meets both criteria, the natural meaning of the statutory phrase is that the final modifier—"involving a minor or ward"—applies to all the preceding terms of the series, not just the last. *See Paroline*, 134 S. Ct. at 1721; *United States v. Bass*, 404 U.S. 336, 339–40 (1971).

1. The series-qualifier principle applies because "involving a minor or ward" makes sense with all three terms in the series.

The first criterion for application of the rule, that the modifier make sense with *all* terms in the series, was set out in *Porto Rico Railway*, 253 U.S. at 348. There, this Court considered a statute that conferred jurisdiction on the District Court of Puerto Rico over cases "where all of the parties on either side ... are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico." *Id.* at 346. This Court held that "not domiciled in Porto Rico" modified not only its immediately preceding referent ("citizens of a state, territory, or district of the United States") but "citizens or subjects of a foreign state or states" as well. *Id.* at 348. Justice Brandeis, writing for a unanimous Court, explained: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.*

Subsequently, in *Bass*, 404 U.S. at 339–40, this Court applied the same principle to a series similar to the one here, punishing any previously convicted felon "who receives, possesses, or transports in commerce or affecting commerce ... any firearm." This Court held that the "'natural construction of the language'" indicated that the phrase "in commerce or affecting commerce" modified all three antecedents on the list, not just "transports." *Id.* (quoting *Porto Rico Ry.*, 253 U.S. at 348). That was true, the Court reasoned, because the qualifying phrase

"undeniably applies to at least one antecedent, and ... makes sense with all three[.]" *Bass*, 404 U.S. at 339–40.

Just two Terms ago, in *Paroline*, this Court once again applied the series-qualifier principle, this time to a list of categories of losses for which restitution is payable to victims of child-pornography offenses. The list included medical services; physical and occupational therapy; transportation, temporary housing, and child care; lost income; attorney's fees and costs; and "a final catchall category for 'any other losses suffered by the victim as a proximate result of the offense.'" 134 S. Ct. at 1720 (citing § 2259(b)(3)(A)–(E) and quoting § 2259(b)(3)(F)). This Court rejected the argument, based on the rule of the last antecedent, that "as a proximate result of the offense" modified only the last enumerated category ("any other losses suffered by the victim"), and held, following *Porto Rico Railway*, that because the "proximate result" language fit each preceding element of damages, the "natural construction" of the language was that it qualified all. 134 S. Ct. at 1721.

Here, "involving a minor or ward" applies equally well to all three preceding elements, "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct." The final modifier is, as this Court has noted in similar cases, "'applicable as much to the first and other words as to the last,'" *id.* (quoting *Porto Rico Ry.*, 253 U.S. at 348), "undeniably applies to at least one antecedent, and ... makes sense with all." *Bass*, 404 U.S. at 339–40. No incongruity emerges from applying the modifier "involving a minor or ward" to each preceding element of the list.

2. The series-qualifier principle also applies because the phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct" constitutes an integrated list of related elements.

The series-qualifier rule also applies when the preceding series constitutes a "single, integrated list" of related elements. *Jama*, 543 U.S. at 344 n.4. In *Jama*, this Court described the series in *Bass*—"receives, possesses, or transports"—as just such an "integrated" list. *Id.*; *see Bass*, 404 U.S. at 337. The words in that list are "integrated" in function and content. Functionally, "receives," "possesses," and "transports" perform the same grammatical role: they are all transitive verbs in parallel construction, separated by commas, that immediately precede the adverbial phrase "in commerce or affecting commerce." The verbs are closely related in content. Each deals with slightly different, but overlapping, actions with respect to a firearm. The relationship of the terms in *Bass* is particularly tight because of the overlap among the elements. That is, one can hardly receive a firearm without possessing it, or transport it without having somehow received it or without possessing it, at least constructively. The application of the final modifier to each element is natural because there is no syntactic or substantive reason to restrict the scope of the modifying phrase.

Here, the list "aggravated sexual abuse, sexual abuse, or abusive sexual conduct" is likewise integrated. Grammatically, the list is a single series of three noun phrases in parallel construction, appearing next to each other and separated by commas, that immediately

precede the postpositive modifier "involving a minor or ward."[2] Substantively, all three terms describe iterations of the same basic conduct, unlawful or wrongful sexual behavior. Like the list in *Bass*, the list of state-law predicates in § 2252(b)(2) reads sensibly if one applies the series-qualifier rule. *See also, e.g.*, *Porto Rico Ry.*, 235 U.S. at 346 (statutory list was series of parallel noun phrases, separated by commas, all describing classes of federal-court litigants); *Paroline*, 134 S. Ct. at 1720 (series of parallel noun phrases, separated by semicolons, all referring to financial losses that a victim of a child-pornography offense might incur).

The similarity of the terms reinforces the conclusion that "involving a minor or ward" must modify all of them. Congress did not define "aggravated sexual abuse," "sexual abuse," or "abusive sexual conduct" for purposes of § 2252, so they carry their "'ordinary, contemporary, common meaning.'" *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Numerous courts of appeals have so recognized. *See, e.g.*, *United States v. Hubbard*, 480 F.3d 341, 348 (5th Cir. 2007) (Congress intended terms to be "generic terms, describing generic offenses"). And respondent agrees. *See, e.g.*, Brief of Appellee United States at 15, *United States v. Sinerius*, 504 F.3d 737 (9th Cir. 2007) (No. 06-30327).

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2. Thus, the textual basis for applying the series-qualifier principle is even stronger here than it was in *Paroline*. In that case, the listed items appeared in distinct statutory subparagraphs, § 2259(b)(3)(A)–(E), each separated by a semicolon, with the modifying clause in the last subparagraph, § 2259(b)(3)(F). Here, the terms of the series appear next to each other, separated only by commas, in the very same sentence.

The ordinary meaning of "sexual abuse" is "physical or nonphysical misuse or maltreatment ... for a purpose associated with sexual gratification." *United States v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001). Likewise, because "conduct" is "behavior in a particular situation," *Webster's Third New Int'l Dictionary* 474 (1986), the ordinary meaning of "abusive sexual conduct" is the same as the ordinary meaning of sexual abuse: behavior that entails misusing or maltreating another for purposes of sexual gratification. *See, e.g., United States v. Barker*, 723 F.3d 315, 324 (2d Cir. 2013) (defining "'abusive sexual conduct involving a minor' as 'misuse or maltreatment of a minor for a purpose associated with sexual gratification'"); *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009) (same). And the ordinary meaning of "aggravated sexual abuse" is "sexual abuse" "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime." *Black's Law Dictionary* 75 (9th ed. 2009) (defining "aggravated"). Each term refers to wrongful sexual behavior.

"Sexual abuse" and "abusive sexual conduct" are thus nearly synonymous as a matter of everyday speech. Moreover, any fine distinction in meaning between the individual terms of the series is eliminated by the broadening statutory phrase "relating to," which modifies each of the elements and binds them together even further as a set. The "ordinary meaning" of "relating to" "is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). Given the broadening effect of that

phrase, any state offense "relating to ... sexual abuse," defined in plain English as misuse or maltreatment for a purpose associated with sexual gratification, *Padilla-Reyes*, 247 F.3d at 1163, will also "relat[e] to ... abusive sexual conduct," defined in the same way, *Barker*, 723 F.3d at 324—and vice versa. *See also, e.g.*, N.Y. Penal Law § 130.00(10) ("'Sexual conduct' means sexual intercourse, oral sexual conduct, anal sexual conduct, aggravated sexual contact, or sexual contact."). And logically, any state offense "relating to aggravated sexual abuse" necessarily relates to "sexual abuse." *See United States v. Vado*, 2015 WL 1611337, at *4 n.4 (S.D.N.Y. Apr. 10, 2015). Because Congress deliberately used the term "relating to" as a preface to the list of state sexual-abuse offenses, it conceived of them as an interconnected whole. By the same token, it intended the final modifier "involving a minor or ward" to qualify the entire preceding entity.

Where Congress uses overlapping terms such as "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct," this Court treats them as a unit, with any final modifier applied to the whole. *See, e.g., United States v. Olano*, 507 U.S. 725, 732 (1993) (construing phrase "[p]lain errors or defects affecting substantial rights" in former Fed. R. Crim. P. 52(b), treating related words "errors" and "defects" as identical terms meaning "error," and holding that both terms were modified by "affecting substantial rights").

3. Applying the series-qualifier principle here comports with ordinary English usage.

Applying the series-qualifier principle here respects not just the rules of syntax and this Court's precedents but ordinary English usage. In practice, when a final modifier makes sense with every preceding term, and those terms are closely related to one another, the rule comports with how people speak and legislators write. For example, a sign at a lake may allow "swimming, boating, or fishing before sunset only." Any visitor would understand that the limiting phrase "before sunset only" modifies all three water activities (not just fishing), so that nighttime swimming and boating are also prohibited. Or a restaurant menu may offer a lunch special consisting of a "cheeseburger, hamburger, or turkey burger with fries." Diners would expect fries to come with any of the three burgers, not just the last. On the other hand, if the listed foods were not closely integrated—"a bowl of soup, a salad, or a hamburger with fries," for example—the final modifier would not apply to all, and it is doubtful anyone would expect fries with her soup.[3]

In everyday speech, no one would anticipate the wooden application of the last-antecedent rule that respondent has advanced and that, in the example of the three burgers, would provide fries only with a turkey burger. The last-antecedent rule, though "'quite sensible as a matter of grammar,'" *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (quoting *Nobelman v. American Sav. Bank*,

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3. The Pledge of Allegiance ends with the phrase "with liberty and justice for all." 4 U.S.C. § 4. Even grade-school students instinctively understand that liberty, not only justice, is "for all."

508 U.S. 324, 330 (1993)), must often yield to context and "other indicia of meaning." *Id.*[4] Groucho Marx famously said, "One morning I shot an elephant in my pajamas. How he got into my pajamas I don't know." *Animal Crackers* (Paramount 1930). The quip draws laughs precisely because our ears understand that Groucho, not the elephant, was in pajamas.

4. Had Congress intended "involving a minor or ward" to modify only "abusive sexual conduct," the statute would read differently.

Congress intended "involving a minor or ward" to modify the entire preceding three state-law categories of sexual abuse. Had Congress meant for "involving a minor or ward" to modify only "abusive sexual conduct," it could easily have drafted the statute to say so, in at least two alternative ways.

First, Congress could have placed "abusive sexual conduct involving a minor or ward" first in the series. Thus drafted, the enhanced penalties of § 2252(b)(2) would apply to a defendant convicted of a prior state offense "relating

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4. Though the parties and the lower court referred to the last-antecedent rule, the more appropriate term in these circumstances may be the rule of the "nearest reasonable referent." *See Reading Law* 152–53 (noting that, "[s]trictly speaking, only pronouns have antecedents"). The nearest-reasonable-referent rule provides: "When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent." *Id.* at 152. That rule does not assist respondent any more than the last-antecedent rule because the terms of the series here *are* parallel.

to abusive sexual conduct involving a minor or ward, aggravated sexual abuse, or sexual abuse." *See Reading Law* 149 ("To make certain that the postpositive modifier does not apply to each item, the competent drafter will position it earlier[.]").

Second, Congress could have set the phrase "abusive sexual conduct involving a minor or ward" apart from the other items in the series by inserting "to" before "abusive sexual conduct." *See id.* at 149–50 (discussing how a legislature might use the word "to" or other words to "set the last phrase apart"). Thus drafted, the statute would encompass prior state convictions under laws "relating to aggravated sexual abuse, sexual abuse, or *to* abusive sexual conduct involving a minor or ward," thereby making clear that the modifier applies only to "abusive sexual conduct."

Congress's decision to employ neither of these drafting options reinforces the conclusion that "involving a minor or ward" modifies the entire preceding series of state-law predicates. *See, e.g., Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) ("Had Congress intended the [construction urged by respondents], it easily could have drafted language to that effect.").[5]

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5. Of course, Congress could have eliminated any dispute about its intent to limit all state sex-abuse predicates to crimes involving children or wards by repeating the modifier "involving a minor or ward" after each item in the series. That is, Congress could have expressly included prior state offenses "relating to aggravated sexual abuse involving a minor or ward, sexual abuse involving a minor or ward, or abusive sexual conduct involving a minor or ward." Congress understandably chose to avoid that cumbersome locution by simply placing "involving a minor or

B. The statutory context, structure, and history confirm that "involving a minor or ward" modifies the entire series of state-law predicates.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Section 2252(b)(2)'s context and the overall scheme of federal child-pornography laws confirm that the phrase "involving a minor or ward" modifies "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct." Specifically, in § 2252(b)(2) and neighboring provisions, Congress treated prior federal and state convictions differently, limiting the latter to crimes against children. Contrary to the Second Circuit's view, Congress's design is rational, deliberate, and administrable.

1. Convictions for several enumerated federal offenses constitute § 2252(b)(2) predicates, but state-law convictions for the same conduct qualify only if they involve children.

Section 2252(b)(2), like its neighboring penalty provisions, §§ 2252(b)(1), 2252A(b)(1), and 2252A(b)(2), contains a basic punishment and a recidivist enhancement. In all four paragraphs, the recidivist enhancement applies to a defendant with a prior conviction under enumerated federal statutes or under state laws "relating to" generic

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ward" at the end of the series, in accordance with the series-qualifier principle.

forms of sexual misconduct. It is true today, and has been true at all times since these provisions were enacted, that the qualifying federal convictions encompass more conduct than their state-law counterparts. In particular, Congress has provided that several enumerated federal predicates may involve adults or children, while limiting the analogous state-law predicates to offenses involving children. Far from being "unreasonable" or "strange," as the Court of Appeals fretted, JA 20–21, that is an intentional feature of this statutory scheme.

For example, the list of qualifying federal offenses in § 2252(b)(2) (and §§ 2252(b)(1), 2252A(b)(1), and 2252A(b)(2)), includes crimes under chapter 71 of Title 18 (entitled "Obscenity"). Chapter 71 punishes, among other things, selling, mailing, importing, broadcasting, producing, and distributing by cable or subscription television obscene matter. §§ 1461–66, 1468. By their terms, these statutes do not require the obscene matter to involve children. But § 2252(b)(2) does not enhance a defendant's sentence based on a prior state conviction for disseminating obscene materials that depict adults, even though many states have such laws. *See, e.g.*, Ariz. Rev. Stat. § 13-3502 (production, publication, sale, possession, and presentation of obscene items); Ind. Code Ann. § 35-49-3-1 (sale, distribution, or exhibition of obscene matter); Nev. Rev. Stat. § 201.249 (production, sale, distribution, exhibition, and possession of obscene items). Rather, to trigger § 2252(b)(2)'s mandatory minimum (or the mandatory minimums in §§ 2252(b)(1), 2252A(b)(1), and 2252A(b)(2)), a defendant must have "a prior conviction under the laws of any State relating to ... the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of *child* pornography." (emphasis added). Thus, a defendant convicted under federal law for disseminating obscene

adult pornography would face § 2252(b)(2)'s mandatory minimum, but a defendant convicted under state law for disseminating the same pornography would not.

Similarly, §§ 2252(b)(1) and 2252A(b)(1) provide that a conviction under chapter 117 (the current version of the Mann Act) or under § 1591, which criminalize sex trafficking of both adults and children, is a federal predicate. Even though many states likewise prohibit sex trafficking of both adults and children, *see, e.g.*, N.Y. Penal Law § 230.34; W. Va. Code § 61-2-17, Congress limited state-law predicates in §§ 2252(b)(1) and 2252A(b)(1) to "sex trafficking of children." Again, a defendant convicted under federal law of operating an adult prostitution business would be subject to a mandatory minimum penalty, but a defendant convicted under state law of doing the same would not.[6] Hence the manifest error of the courts of appeals that have observed that "it would have been strange had Congress on the one hand authorized heavier punishment for offenders who had a prior federal conviction for a sexual crime whether or not it involved a minor, and on the other hand insisted that if the prior conviction had been for a state offense, even one identical to one of the enumerated federal offenses, the victim had to be a minor." *E.g.*, *United States v. Rezin*, 322 F.3d 443,

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6. Other enumerated federal offenses lack any sexual element altogether, and thus correspond to no state-law predicates, confirming that Congress intended no parity between the groups. *See, e.g.*, 18 U.S.C. §§ 1464 (in chapter 71, broadcasting indecent but not necessarily sexual material); 2258 (in chapter 110, failing to report child abuse, including non-sexual physical abuse).

448 (7th Cir. 2003) (quoted in JA 20–21). That result is anything but "strange." It is just what Congress provided.[7]

Section 2252 has treated prior federal and state convictions differently as long as the statute has been on the books. From its enactment in 1978 until 1996, § 2252(b)(2) did not include any state predicates, even though it included federal predicates that corresponded to common state-law offenses. For example, on enactment in 1978, § 2252 (which at the time prohibited only the distribution of child pornography) included a recidivist enhancement for a defendant with "a prior conviction under this section." Protection of Children Against Sexual Exploitation Act of 1977, § 2(a), Pub. L. No. 95-225, 92 Stat. 7, 8 (1978). But Congress included no enhancement for prior state-law distribution convictions, even though many states prohibited such conduct at that time. *See* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Judiciary Comm., 95th Cong., 1st Sess., at 326–28 (1977) (survey by National Conference of State Legislatures). And in 1994, Congress enlarged the set of federal predicates to include offenses under chapters 109A and 110 of Title 18—which generally include

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7. Congress has shown that it can achieve perfect congruence between state and federal predicate offenses in recidivist provisions. *See, e.g.*, § 2426(b)(1) (a "prior sex offense conviction" that exposes defendant to heightened sentencing range for chapter 117 conviction is an offense under enumerated federal statutes or "under State law for an offense consisting of conduct that would have been" an enumerated federal offense "if the conduct had occurred within the special maritime and territorial jurisdiction of the United States"). Notably, this provision was part of the same legislation that added "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" to §§ 2252(b)(2) and 2252A(b)(2). Protection of Children from Sexual Predators Act of 1998, § 104(a), Pub. L. No. 105-314, 112 Stat. 2974, 2976.

sexual-abuse and child-pornography offenses—but again, not state convictions for the same crimes. Violent Crime Control and Law Enforcement Act of 1994, § 160001(d), Pub. L. No. 103-322, 108 Stat. 1796, 2037.

Not only has Congress always distinguished between prior federal and state convictions, it has done so by requiring the latter to involve children. That design appears in the first legislation to include state-law predicates, the Child Pornography Prevention Act of 1996 ("CPPA"), Pub. L. No. 104-208, 110 Stat. 3009. Indeed, the CPPA has particular relevance to the question presented because it also added the language at issue here—"a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—to the U.S. Code for the first time. The CPPA added state-law recidivist enhancements to §§ 2251, 2252, and 2252A. For production of child pornography, § 2251, the CPPA provided an enhanced sentence for defendants with prior state convictions "relating to the sexual exploitation of children." CPPA subsection 4, 110 Stat. at 3009-30. For simple possession of child pornography, §§ 2252(b)(2) and 2252A(b)(2), the CPPA provided an enhanced sentence for defendants with prior state convictions "relating to the possession of child pornography." CPPA subsection 5, 110 Stat. at 3009-29 to 3009-30. And for defendants convicted of receiving or distributing child pornography, §§ 2252(b)(1) and 2252A(b)(1), the CPPA mandated an enhanced sentence for prior state convictions "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." CPPA subsection 5, 110 Stat. at 3009-30.[8]

8. That language was added to §§ 2252(b)(2) and 2252A(b)(2) in 1998. Protection of Children from Sexual Predators Act of

These provisions "are best analyzed together, owing to their contemporaneous enactment and the similarity of their pertinent language." *Cortez Byrd Chips v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000). When they are, they indicate that all the state-law predicates involve crimes against children. It is not a reasonable reading of these contemporaneously enacted provisions that Congress limited the state-law predicates for production and simple possession of child pornography to crimes against children, while treating the predicates for receipt and distribution of child pornography differently. Rather, the more logical inference is that Congress limited all state-law predicates to offenses involving minors (and wards, who, like minors, are vulnerable to sexual abuse and are incapable of consenting to sex by virtue of their status).

2. Congress sensibly decided to treat federal and state convictions differently.

The decision to treat prior federal and state sex-abuse convictions differently also makes sense. Congress, familiar with its own criminal statutes, knew what conduct it was capturing under federal law and could be confident that all covered federal offenses were proper predicates. But Congress did not have the same familiarity with the varied and mutable sexual-abuse laws of all fifty states. *See, e.g.*, *Acosta v. Ashcroft*, 341 F.3d 218, 227 (3d Cir. 2003) (Alito, J.) (noting that Congress is "[f]amiliar with the operation of the federal criminal justice system" but generally less familiar with the operation of "state

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1998, § 202(a)(2), Pub. L. No. 105-314, 112 Stat. 2974, 2978. *See infra* pp. 31–33.

criminal justice systems"). Consequently, Congress may have been concerned that individual states could criminalize relatively low-level conduct that, broadly speaking, "relat[es] to ... sexual abuse" but does not categorically warrant the severely enhanced penalties of § 2252(b) unless it involves a minor.

Many states, for example, punish as misdemeanors public lewdness or indecent exposure in the presence of others. *See, e.g.*, Ohio Rev. Code Ann. § 2907.09(A)(1) (exposing private parts "under circumstances in which the person's conduct is likely to be viewed by and affront others" is a fourth-degree misdemeanor punishable by 30 days in jail). Congress could have reasonably concluded that these and similar state misdemeanor offenses, which arguably "relat[e] to ... sexual abuse" because they entail "misuse" or "maltreatment" of bystanders to gratify the actor sexually, *see Padilla-Reyes*, 247 F.3d at 1163, do not warrant § 2252(b)(2)'s severe mandatory minimum sentence unless they involve children. That would explain why Congress decided to adopt a floor: qualifying state predicates must not only relate to behavior that is sexual and abusive but must, to ensure that they capture sufficiently culpable and dangerous recidivists, "involv[e] a minor or ward."

Congress may also have chosen to minimize the administrative burden associated with applying these penalty provisions. This Court has noted the difficulty, under the categorical approach, of comparing prior state convictions to generic federal terms such as "sexual abuse." *See, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (citing interpretations of prior state convictions that are "anything but evenhanded, predictable, or consistent").

For example, under respondent's approach, a federal court confronted with a prior state conviction for cyberstalking involving threats of sexual assault against an adult, *e.g.*, 720 Ill. Comp. Stat. 5/12-7.5(a-3)(1)–(2), would have to decide whether that offense "relat[ed] to ... sexual abuse," in which case it would qualify as a § 2252(b) predicate, or "relat[ed] to ... abusive sexual conduct," in which case it would not. The same taxonomic problem would arise with respect to, say, state convictions under so-called "revenge porn" laws criminalizing the dissemination of another's (consensually obtained) nude photos without that person's consent, *e.g.*, Wis. Stat. § 942.09(3m)(a)(2). Congress can sensibly have decided against embroiling federal courts in such indeterminate line-drawing exercises or inviting arbitrary results across jurisdictions. Limiting all state predicates to crimes involving children makes this inquiry far easier: there is no doubt that threatening a child with sexual assault or publishing an adolescent's nude photos online "relat[e] to" both "sexual abuse" and "abusive sexual conduct."

C. Petitioner's natural reading of the statute comports with the contemporary understanding of Congress and the Department of Justice.

At the time of enactment, both Congress and the Department of Justice (DOJ) understood the statutory language the way petitioner does. That shared understanding further demonstrates that petitioner's reading is both natural and correct. *See, e.g.*, *Roadway Express v. Piper*, 447 U.S. 752, 759 (1980) (construing statutory term in light of "contemporaneous understanding").

As noted, the language that now appears in § 2252(b)(2) —referring to a prior conviction "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—was first introduced into the U.S. Code in 1996 as part of the CPPA (in §§ 2252(b)(1) and 2252A(b)(1)).

Congress's overarching concern in enacting the CPPA was to protect child victims from the "vicious cycle of child sexual abuse and exploitation" in which "[c]hild pornography plays a critical role." S. Rep. No. 104-358, 1996 WL 506545, at *12. In particular, Congress perceived a link between child pornography and sex offenses against minors. *See* CPPA subsection 1(3), (4), 110 Stat. at 3009-26 (finding that "child pornography is often used as part of a method of seducing other children into sexual activity" and that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites"). Accordingly, Congress indicated that the specific statutory purpose for the enhanced penalties set forth in § 2252 was to incapacitate repeat offenders with prior convictions under certain federal laws or "under *any State child abuse law* or law relating to the production, receipt, or distribution of child pornography." S. Rep. No. 104-358, 1996 WL 506545, at *9 (emphasis added). The statutory purpose was to enhance sentences of federal offenders who had previously violated "State child abuse" laws and thus posed a particular risk of using child pornography to harm children.[9]

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9. The Court of Appeals dismissed this history solely because it was "brief" (JA 24), but that is no basis for ignoring probative evidence of legislative intent. *See Kaiser Aluminum & Chem. Corp.*

Notably, in 1998, DOJ, addressing Congress, construed the language at issue here—"a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—and gave it the same natural reading advanced by petitioner. As discussed earlier, *see supra* p. 26, this language first appeared in 1996, when it was added to §§ 2252(b)(1) and 2252A(b)(1), which penalize receipt and distribution of child pornography—but not to §§ 2252(b)(2) and 2252A(b)(2), which penalize simple possession of such material. (The pre-1998 versions of §§ 2252(b)(2) and 2252A(b)(2) contained recidivist enhancements only for state-law offenses "relating to the possession of child pornography.") In 1998, DOJ urged Congress to harmonize the penalties for receipt and distribution, on the one hand, and possession on the other. In a letter to the House Judiciary Committee setting forth "the views of the Department of Justice" on the bill that became the Protection of Children from Sexual Predators Act of 1998, DOJ wrote:

> [W]hile there is a 5-year mandatory minimum sentence for individuals charged with receipt or distribution of child pornography and who have *prior state convictions for child molestation* (18 U.S.C. §§ 2252(b)(1) and 2252A(b)(1)), there is no enhanced provision for those individuals charged with possession of child pornography who have *prior convictions for child abuse.* (18 U.S.C. §§ 2252(b)(2) and 2252A(b)(2) provide only for increased minimums for state

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v. Bonjorno, 494 U.S. 827, 839–40 (1990) (relying on "brief legislative history" to interpret a statute).

> convictions for possession.) We suggest an increased mandatory minimum sentence of 2 years for individuals charged with a violation of any subsection of 2252 or 2252A, if the individual had a prior conviction for sexual abuse *of a minor.*

H.R. Rep. 105-557, 1998 WL 285821, at *3, *31 (emphases added).

The Justice Department thus interpreted the statutory phrase "a prior conviction under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" as synonymous with "prior state convictions for *child* molestation." *Id.* at *31 (emphasis added). That contemporaneous interpretation is "persuasive evidence of the original understanding" of the phrase. *United States v. Bd. of Comm'rs*, 435 U.S. 110, 131 (1978). And the Justice Department asked Congress to harmonize the penalty provisions by enhancing offenses under §§ 2252 and 2252A "if the individual had a prior conviction for sexual abuse *of a minor*." H.R. Rep. 105-557, 1998 WL 285821, at *31 (emphasis added). Congress responded by adding the statutory phrase in §§ 2252(b)(1) and 2252A(b)(1)—"a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"—to §§ 2252(b)(2) and 2252A(b)(2) as well.

The implication of this inter-branch dialogue is unmistakable. DOJ understood that only state offenses relating to the abuse of *children* qualified as predicates for the receipt and distribution of child pornography. It asked

Congress to bring the state predicates for possession of child pornography into alignment. And Congress did so by making the categories of state-law predicates identical. By far the likeliest inference is that Congress shared DOJ's understanding of the relevant statutory language.

D. The Second Circuit's decision is wrong.

In holding that the phrase "involving a minor or ward" modifies only "abusive sexual conduct," the Court of Appeals committed several errors. The court: (1) wrongly assumed that Congress did not intend to treat prior federal and state convictions differently under § 2252(b)(2); (2) invoked the rule against surplusage to reject petitioner's reading, when that rule has no application to a statute like this one in which surplusage is unavoidable; and (3) relied on an illusory parallel between the titles of the federal sex-abuse crimes in chapter 109A and the generic state-law sex-abuse offenses listed in § 2252(b)(2).

1. The court relied on the false "assumption" that Congress intended to treat prior federal and state convictions equally.

The Second Circuit rested its holding largely on "the assumption that Congress would intend for courts to treat prior sexual abuse convictions similarly, regardless of whether the conviction was under federal or state law." JA 23. Indeed, this assumption "compel[led]" the court's holding, and other courts of appeals have followed the same mistaken path. *See* JA 22–23 (collecting cases). The court did not substantiate this "assumption," and it is incorrect. As we have already shown, Congress's intent to treat prior federal and state convictions differently—and

to limit the state predicates to crimes involving children—is a salient feature of this statutory scheme.

2. The court relied incorrectly on the rule against surplusage.

The Court of Appeals also opined that reading the state categories of sexual abuse as an integrated and related list modified by the final phrase "involving a minor or ward," "may run up against" the rule against surplusage (JA 17), which requires that "every clause and word of a statute should, if possible, be given effect." *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (citations and internal quotation marks omitted). But the surplusage canon has force only when a competing interpretation would give effect to every word, which is not possible here. *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013). Thus, the surplusage rule does not undermine petitioner's reading. In fact, as discussed earlier, *see supra* pp. 15–18, the redundancy and overlap of the terms in the series at issue makes application of the series-qualifier principle especially appropriate.

The surplusage rule, by its terms, is not "absolute." *Id.* (citing *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) ("While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown.")). The Second Circuit's reliance on the rule was misplaced, for two reasons.

First, the rule "assists only where a competing interpretation gives effect to every clause and word of a statute." *Marx*, 133 S. Ct. at 1177 (citation and internal

quotation marks omitted). Here, no interpretation gives effect to every statutory word. Even on respondent's reading, for example, "aggravated sexual abuse" is redundant because every offense "relating to" it necessarily relates to "sexual abuse" as well. *See Vado*, 2015 WL 1611337, at *4 n.4 (recognizing this redundancy).

Second, redundancy is hardly unusual in statutory lists of the sort at issue here, for "'Congress often uses multiple words with overlapping meaning to capture a broad swath of conduct.'" *United States v. Shrader*, 675 F.3d 300, 311 (4th Cir. 2012) (quoting *United States v. Laureys*, 653 F.3d 27, 41 (D.C. Cir. 2011)). Indeed, in this very statute, Congress used redundant language in describing other state-law predicates: the "production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." § 2252(b)(2). Congress also included as state predicates prior convictions relating to "sex trafficking of children" even though such convictions would seem to be encompassed by convictions "relating to ... abusive sexual conduct involving a minor or ward." §§ 2252(b)(1) and 2252A(b)(1). Surplusage is thus unavoidable in this statute, making the Second Circuit's reliance on the surplusage canon inappropriate. *See Moskal*, 498 U.S. at 120 (Scalia, J., dissenting) (noting that the surplusage rule should not "be applied to the obvious instances of iteration to which lawyers, alas, are particularly addicted—such as 'give, grant, bargain, sell, and convey[.]'").

3. The court relied on a presumed structural parallel that does not exist.

The Court of Appeals also relied on an illusory parallel between the three listed categories of generic state-law

sex-abuse offenses in § 2252(b)(2) ("aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward") and the titles of three of the four federal sex crimes defined in 18 U.S.C. §§ 2241 (titled "aggravated sexual abuse"), 2242 (titled "sexual abuse"), 2243 (titled "sexual abuse of a minor or ward"), and 2244 (titled "abusive sexual contact"). The court noted that "adult and minor victims are included under the first two provisions, while Section 2243 covers only minors and wards," and theorized that, though "the language used in § 2252(b)(2) is not identical to these statutory titles, it nonetheless suggests that Congress intended to impart a similar structure to state-law predicate offenses for purposes of this sentencing enhancement." JA 23.

The court's conclusion is unsound for several reasons. First, Congress did not intend the state sex-abuse predicates in § 2252(b)(2) to be defined by reference to the federal sex-abuse crimes in chapter 109A. *See, e.g.*, *Hubbard*, 480 F.3d at 348 (holding that the terms "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" in § 2252A(b)(1) are "generic terms, describing generic offenses" without reference to the federal offenses defined elsewhere in the United States Code); *see also, e.g.*, *Barker*, 723 F.3d at 324; *Sonnenberg*, 566 F.3d at 671. Respondent has repeatedly acknowledged in the lower courts that the terms "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct," as used in §§ 2252(b) and 2252A(b), should be interpreted in accordance with their ordinary meaning, rather than, for example, by reference to §§ 2241–44. *See, e.g.*, Brief of Appellee United States at 15, *Sinerius*, 504 F.3d 737 (No. 06-30327) ("[T]here is not the slightest hint in the statutory text that Congress sought to measure state

offenses by [reference to] federal sex crimes."); Appellee's Brief at 11, *Sonnenberg*, 556 F.3d 667 (No. 08-1197) ("There is no indication that Congress sought to measure state predicate offenses by the definition of federal sex crimes found in any of the referenced chapters [of the United States Code].")

Second, the language and structure of the federal sex-abuse offenses listed in chapter 109A do not parallel the state offenses listed in § 2252(b)(2) in the way the court suggested. For example, chapter 109A includes four federal sexual-abuse crimes ("aggravated sexual abuse" (§ 2241), "sexual abuse" (§ 2242), "sexual abuse of a minor or ward" (§ 2243), and "abusive sexual contact" (§ 2244)). But § 2252(b)(2) lists only *three* categories of state sex-abuse offenses ("aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward") qualifying for the enhancement. And the third category differs from the titles of the third and fourth federal sexual-abuse crimes listed in chapter 109A, §§ 2243 ("sexual abuse of a minor or ward") and 2244 ("abusive sexual contact").

The Court of Appeals appears to have assumed that "abusive sexual conduct involving a minor or ward" corresponds to the federal crime of "sexual abuse of a minor or ward," § 2243. But that assumption begs the question: it rests on the premise that "involving a minor or ward" in § 2252(b)(2) modifies only "abusive sexual conduct," the very issue in dispute. If the modifier applies to the entire series, the parallel perceived by the court evaporates. And the term "abusive sexual conduct" in § 2252(b) more closely resembles the federal crime of "abusive sexual contact," § 2244, which, like "aggravated

sexual abuse" (§ 2241) and "sexual abuse" (§ 2242) can be committed against *both* minors and adults. Accordingly, to the extent any parallel exists, it suggests that Congress intended "involving a minor or ward" to modify and limit *all three* listed state categories of abusive sex ("aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct"), not just the last one.[10] For all these reasons, the parallel perceived by the Court of Appeals is chimerical.

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In sum, the best reading of § 2252(b)(2)'s language, construed in light of the series-qualifier principle, basic

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10. The Court of Appeals also saw a parallel between the list of state-law predicates in § 2252(b)(2) and the list in § 2251(e) ("aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children"). The court noted that, in § 2251(e), "aggravated sexual abuse, sexual abuse, and abusive sexual conduct [*sic*] do not form their own separate list ending in a common modifier; rather, 'abusive sexual contact involving a minor or ward' is the third element of a four-element list[.]" JA 16 n.3. The court "assume[d] that Congress intended § 2251(e)'s similar language to be read in tandem with § 2252(b)(2)," which "suggests that the series qualifier canon should not be applied" to § 2252(b)(2). JA 17 n.3. But the quoted language was added to § 2251(e) in 2006, a decade after similar language appeared in § 2252(b). *See* Adam Walsh Child Protection and Safety Act of 2006, § 206(b)(1)(B), Pub. L. No. 109-248, 120 Stat. 587, 614. And "the views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight." *United States v. X-Citement Video*, 513 U.S. 64, 77 n.6 (1994). Moreover, § 2251(e)'s language differs from § 2252(b)(2)'s, and "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted).

English usage, and the statutory context, structure, and history, is that "involving a minor or ward" modifies not only "abusive sexual conduct" but "aggravated sexual abuse" and "sexual abuse" as well. Since petitioner's prior state conviction indisputably did not relate to an offense "involving a minor or ward," he should be resentenced without regard to any mandatory minimum punishment.

II. If an ambiguity remains, the rule of lenity resolves it in petitioner's favor.

If, despite the preceding analysis, this Court retains a doubt as to the meaning of § 2252(b)(2), the rule of lenity resolves the dispute in petitioner's favor. Respondent's interpretation is, at best, highly doubtful, and in a criminal case, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 348; *accord Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("[W]e have instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'") (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Accordingly, the enhanced minimum and maximum sentences of § 2252(b)(2) do not apply to petitioner.

A. The rule of lenity requires that ambiguous criminal laws be interpreted to favor the defendant.

This Court has long recognized that the "rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). "The rule that penal laws are to be construed strictly, is perhaps

not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals[.]" *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). The rule of lenity means that once other legitimate tools of interpretation have been exhausted, and an ambiguity remains, the Court resolves the ambiguity in the defendant's favor. *See United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). Thus, where "a reasonable doubt persists about a statute's intended scope" the rule of lenity compels this Court to adopt the more lenient interpretation. *Moskal*, 498 U.S. at 108; *see Hughey v. United States*, 495 U.S. 411, 422 (1990) ("[P]rinciples of lenity ... demand resolution of ambiguities in criminal statutes in favor of the defendant[.]").

Presented with a criminal statute of ambiguous meaning, courts do not choose the harsher alternative unless Congress has "'spoken in language that is clear and definite.'" *Bass*, 404 U.S. at 347 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952)). At least two concerns animate this policy. First, the legislature would not impose criminal punishment without making clear what conduct incurs the punishment and what the punishment will be. Thus, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Second, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation

of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. "It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. (5 Wheat.) at 95. "This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348 (quoting Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* Benchmarks 196, 209 (Univ. of Chicago Press, 1967)).

The rule of lenity applies "not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing[.]" *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (citation omitted). Thus, where "any ambiguity survives," this Court will "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *Id.*; *see Bifulco v. United States*, 447 U.S. 381, 387 (1980) (rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose"); *Granderson*, 511 U.S. at 42–43 (applying rule of lenity to interpret a penalty provision to avoid an increase in sentence).

B. Section 2252(b)(2) should not be employed to increase petitioner's sentence because the government has not shown that the statute's recidivist enhancement unambiguously applies to him.

The rule of lenity applies with particular force to a case such as petitioner's, which involves a statute that imposes a mandatory minimum sentence of ten years in

prison, and increases the maximum sentence from ten to twenty years. *See Dean v. United States*, 556 U.S. 568, 585 (2009) (Breyer, J., dissenting) (explaining that the rule of lenity has "special force in the context of mandatory minimum provisions"). It has been "uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). In the vast majority of federal criminal cases, the sentencing court is directed to impose a sentence sufficient, but not greater than necessary, to accomplish the purposes of criminal punishment in light of the facts of the particular crime and the history and characteristics of the particular defendant. *See* 18 U.S.C. § 3553(a). In contrast, enactment of a mandatory minimum sentence means that Congress has decided to forgo the usual goals of individualized sentencing. It has decided instead that a perceived need for greater incapacitation or deterrence outweighs the need for individualized sentencing. Such laws carry a substantial risk of injustice. They substitute a one-size-fits-all approach for the fundamental premise of just and proportionate sentencing. They also strip the judiciary of much of its discretion to determine a fair and reasonable sentence.[11] *See Dean*, 556 U.S. at 584–85 (Breyer, J., dissenting).

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11. In petitioner's case, the District Court determined that the advisory range of imprisonment under the Sentencing Guidelines is 78–97 months, which takes petitioner's prior conviction into account. JA 46. The District Court could then have imposed a greater or lesser sentence based upon the factors in 18 U.S.C. § 3553(a). *See United States v. Booker*, 543 U.S. 220 (2005). Without the enhancement, the maximum prison sentence would have been ten years, which became the minimum sentence after the enhancement.

A decision to apply the enhanced penalties of § 2252(b)(2) to cases such as petitioner's, when the penalties do not unambiguously apply, will have a serious and negative impact both on individual defendants and on our system of just and proportionate sentencing. The rule of lenity eliminates that risk. Rather than condemn petitioner to ten years in prison when Congress has not clearly mandated it, the rule of lenity requires that the decision of the Court of Appeals be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX — RELEVANT STATUTES

18 U.S.C. § 2251. Sexual exploitation of children.

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly

permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c)

(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such

conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)

(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use

of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than

15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

Appendix

18 U.S.C. § 2252. Certain activities relating to material involving the sexual exploitation of minors.

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)

(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not

more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) Affirmative Defense.— It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

18 U.S.C. § 2252A. Certain activities relating to material constituting or containing child pornography.

(a) Any person who—

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate

or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or

knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce,

for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

(7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor. [1]

shall be punished as provided in subsection (b).

(b)

(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under

the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(3) Whoever violates, or attempts or conspires to violate, subsection (a)(7) shall be fined under this title or imprisoned not more than 15 years, or both.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1)

(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall

be available in any prosecution that involves child pornography as described in section 2256 (8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative Defense.— It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each

such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) Admissibility of Evidence.— On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) Civil Remedies.—

(1) In general.— Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) Relief.— In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(g) Child Exploitation Enterprises.—

(1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

(2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

No. 14-8358

In the Supreme Court of the United States

AVONDALE LOCKHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior New York conviction for first-degree sexual abuse involving an adult victim constitutes a "conviction under * * * the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," thereby triggering the ten-year mandatory minimum sentence provided in 18 U.S.C. 2252(b)(2).

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
A. Statutory background 2
B. Proceedings in petitioner's case 9
Summary of argument 14
Argument:
I. Section 2252(b)(2) requires a mandatory minimum sentence of ten years of imprisonment if a defendant convicted of possesing child pornography has a prior state-law conviction relating to "aggravated sexual abuse" or "sexual abuse," regardless of whether the victim is a minor or ward 17
A. Under the rule of the last antecedent, the term "involving a minor or ward" in Section 2252(b)(2) modifies only "abusive sexual conduct" 18
B. The statutory context of Section 2252(b)(2) confirms the interpretation indicated by the last-antecedent rule 20
C. The drafting history of Section 2252(b)(2) supports the conclusion that Congress intended to include both federal and state sexual-abuse offenses involving adult victims in the recidivist enhancement 24
D. Applying the last-antecedent rule promotes the purpose of Section 2252(b)(2) 25
II. Petitioner's alternative construction of Section 2252(b)(2)'s recidivist enhancement lacks merit 31
A. The series-qualifier principle does not apply 31

Table of Contents—Continued: Page

1. Applying the modifier "involving a minor or ward" to all three categories of state sexual-abuse offenses does not make sense 32
2. Section 2252(b)(2) does not contain an "integrated" list 34
B. No "other indicia of meaning" show that Congress intended the interpretation suggested by the series-qualifier principle 37
1. The rule of the last antecedent produces a more reasonable interpretation of Section 2252(b)(2) than does the series-qualifier principle 37
2. The drafting history does not support petitioner's reading 40
3. The legislative history does not overcome the last-antecedent rule 46
C. The rule of lenity does not apply 49
Conclusion 50
Appendix A — Statutory provisions 1a
Appendix B — Statutory tables of contents 29a

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 516 U.S. 137 (1995) 12
Barnhart v. *Thomas*, 540 U.S. 20 (2003) 12, 14, 16, 18, 31, 37
Boyle v. *United States*, 556 U.S. 938 (2009) 47
Chamber of Commerce v. *Whiting*, 131 S. Ct. 1968 (2011) 48
Descamps v. *United States*, 133 S. Ct. 2276 (2013) 26, 27, 29
Duncan v. *Walker*, 533 U.S. 167 (2001) 33

Cases—Continued: Page

Enron Creditors Recovery Corp. v. *ALFA, S.A.B. DE C.V.*, 651 F.3d 329 (2d Cir. 2011) 19
Exxon Mobil Corp. v. *Allapattah Servs., Inc.*, 545 U.S. 546 (2005) 48
Federal Trade Comm'n v. *Mandel Bros.*, 359 U.S. 385 (1959) 18
Food & Drug Admin. v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 20
Holloway v. *United States*, 526 U.S. 1 (1999) 18
Jama v. *Immigration & Customs Enforcement*, 543 U.S. 335 (2005) 18, 32, 34
Maracich v. *Spears*, 133 S. Ct. 2191 (2013) 49
Miller v. *California*, 413 U.S. 15 (1973) 4
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 41
Muscarello v. *United States*, 524 U.S. 125 (1998) 49
New York v. *Ferber*, 458 U.S. 747 (1982) 4
Nijhawan v. *Holder*, 557 U.S. 29 (2009) 28
Nobelman v. *American Sav. Bank*, 508 U.S. 324 (1993) 38
Osborne v. *Ohio*, 495 U.S. 103 (1990) 5
Osorio v. *State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) 19
Paroline v. *United States*, 134 S. Ct. 1710 (2014) ... 39, 40
Perrin v. *United States*, 444 U.S. 37 (1979) 23
Pioneer Inv. Servs. Co. v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) 23
Porto Rico Ry., Light & Power Co. v. *Mor.*, 253 U.S. 345 (1920) 31, 38
Securities Exch. Comm'n v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943) 26

Cases—Continued: Page

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Stepnowski v. *Commissioner*, 456 F.3d 320 (3d Cir. 2006) 18
Taylor v. *United States*, 495 U.S. 575 (1990) 15, 26
United States v. *Atlantic Research Corp.*, 551 U.S. 128 (2007) 33
United States v. *Barker*, 723 F.3d 315 (2d Cir. 2013) 23
United States v. *Bass*, 404 U.S. 336 (1971) 19, 39
United States v. *Becker*, 625 F.3d 1309 (10th Cir. 2010) 17
United States v. *Gilbert*, 425 Fed. Appx. 212 (4th Cir. 2011) 23
United States v. *Gonzales*, 520 U.S. 1 (1997) 47
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United States v. *Hayes*, 555 U.S. 415 (2009) 28, 38
United States v. *Hubbard*, 480 F.3d 341 (5th Cir.), cert. denied, 552 U.S. 990 (2007) 17, 21, 23
United States v. *Kerley*, 416 F.3d 176 (2d Cir. 2005) 12
United States v. *Laraneta*, 700 F.3d 983 (7th Cir. 2012), cert. denied, 134 S. Ct. 235 (2013) 12
United States v. *Linngren*, 652 F.3d 868 (8th Cir. 2011), cert. denied, 132 S. Ct. 1594 (2012) 18
United States v. *Mateen*:
739 F.3d 300 (6th Cir. 2014) 27, 29
764 F.3d 627 (6th Cir. 2014) 17, 20, 21, 23, 25
United States v. *McCutchen*, 419 F.3d 1122 (10th Cir. 2005), cert. denied, 131 S. Ct. 2961 (2011) 18

Cases—Continued: Page

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United States v. *Olano*, 507 U.S. 725 (1993) 35
United States v. *Osborne*, 551 F.3d 718 (7th Cir. 2009) 23
United States v. *Padilla-Reyes*, 247 F.3d 1158 (11th Cir.), cert. denied, 534 U.S. 913 (2001) 44, 45
United States v. *Pritchett*, 470 F.2d 455 (D.C. Cir. 1972) 19
United States v. *Rezin*, 322 F.3d 443 (7th Cir. 2003) 17, 19, 21, 23, 25
United States v. *Rodriguez*, 711 F.3d 541 (5th Cir.), cert. denied, 134 S. Ct. 512 (2013) 33
United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) 19
United States v. *Sinerius*, 504 F.3d 737 (9th Cir. 2007), cert. denied, 552 U.S. 1211 (2008) 17, 23
United States v. *Sonnenberg*, 556 F.3d 667 (8th Cir. 2009) 23
United States v. *Spence*, 661 F.3d 194 (4th Cir. 2011) 17, 21
United States v. *Turkette*, 452 U.S. 576 (1981) 18
United States v. *Young*, 470 U.S. 1 (1985) 35

Constitution, statutes and guidelines:

U.S. Const.:
Amend. I 4
Amend. V 19
Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, Tit. II, 120 Stat. 587:
§ 206, 120 Stat. 614 ..... 8, 36

Statutes and guidelines—Continued: Page

§ 206(b)(2), 120 Stat. 614 44
§ 206(b)(3), 120 Stat. 614 9
Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-591, Tit. VII, 100 Stat. 3341-74 5
§ 704(b), 100 Stat. 3341-75 6
Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26:
§ 121, 110 Stat. 3009-26 6
§ 121(2)-(3), 110 Stat. 3009-28 to 3009-29 9
§ 121(3), 110 Stat. 3009-29 9
§ 121(4), 110 Stat. 3009-30 ..... 36, 41, 43
§ 121(5), 110 Stat. 3009-30 ..... *passim*
Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 4
§ 4, 98 Stat. 204 5
Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, Tit. III, Subtit. B, 104 Stat. 4816 5
§ 323(a), 104 Stat. 4818-4819 5
Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, Tit. V, 117 Stat. 650:
§ 103(a)(1)(B)(ii), 117 Stat. 652 8
§ 103(a)(1)(C)(ii), 117 Stat. 652 8
§ 103(a)(1)(D)(ii), 117 Stat. 652 9
§ 103(a)(1)(E), 117 Stat. 652 9
§ 103(b)(1)(C)(iii), 117 Stat. 653 8
§ 103(b)(1)(D), 117 Stat. 653 8
§ 103(b)(1)(E)(iii), 117 Stat. 653 9
§ 103(b)(1)(F), 117 Stat. 653 9
§ 507, 117 Stat. 683 8

Statutes and guidelines—Continued: Page

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§ 2(a), 92 Stat. 7 4
§ 2(a), 92 Stat. 8 5
Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105-314, Tit. II, 112 Stat. 2974:
§ 202(a), 112 Stat. 2977 ..... 7, 43
§ 202(a)(1), 112 Stat. 2977 7
§ 202(a)(2), 112 Stat. 2977 7
§ 202(b)(1), 112 Stat. 2978 9
§ 202(b)(2), 112 Stat. 2978 9
Uniform Code of Military Justice, art. 120, 10 U.S.C 920 ..... 8, 21
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XVI, § 160001(d), 108 Stat. 2037 ..... 6, 25, 41
18 U.S.C. App. 1202(a) (1970) 39
18 U.S.C. 922(g) 39
18 U.S.C. 1460-1470 ..... 21, 29a
18 U.S.C. 1591 ..... 8, 43
18 U.S.C. 2241-2243 ..... 15, 22, 1a, 30a
18 U.S.C. 2241-2245 (1994) 6, 41
18 U.S.C. 2241-2248 (1994) 24
18 U.S.C. 2241-2248 ..... 21, 30a
18 U.S.C. 2241 (1994) 24
18 U.S.C. 2241 ..... 13, 22, 1a, 30a
18 U.S.C. 2241(c) 22, 2a
18 U.S.C. 2242 (1994) 24
18 U.S.C. 2242 ..... 13, 22, 3a, 30a
18 U.S.C. 2243 (1994) 24

Statutes and guidelines—Continued: Page

18 U.S.C. 2243 ..... 13, 22, 33, 4a, 30a
18 U.S.C. 2243(b)(1)-(2) 45, 5a
18 U.S.C. 2244 ..... 41, 6a, 30a
18 U.S.C. 2251-2258 (1994) 6, 24, 41
18 U.S.C. 2251-2260A (2012 & Supp. 2013) 21, 31a
18 U.S.C. 2251 (1994) 24
18 U.S.C. 2251 ..... 36, 41, 42, 10a, 31a
18 U.S.C. 2251(a)-(d) 3, 10a
18 U.S.C. 2251(e) 3, 16, 35, 36, 37, 43, 13a
18 U.S.C. 2252(a) (1982) 5
18 U.S.C. 2252(a) 5, 43, 14a
18 U.S.C. 2252(a)(1) (1994) 24
18 U.S.C. 2252(a)(1)-(3) 3, 14a
18 U.S.C. 2252(a)(2) (1994) 24
18 U.S.C. 2252(a)(2) 10, 14a
18 U.S.C. 2252(a)(3) (1994) 24
18 U.S.C. 2252(a)(4) (1994) 24
18 U.S.C. 2252(a)(4) 1, 2, 3, 5, 7, 9, 42, 15a
18 U.S.C. 2252(a)(4)(B) 10, 16a
18 U.S.C. 2252(b) (1982) 5
18 U.S.C. 2252(b)(1) (1994) 6, 24
18 U.S.C. 2252(b)(1) ..... *passim*, 16a
18 U.S.C. 2252(b)(2) (2000) 7
18 U.S.C. 2252(b)(2) ..... *passim*, 17a
18 U.S.C. 2252A 9, 18a, 31a
18 U.S.C. 2252A(a) 3, 18a
18 U.S.C. 2252A(b)(1) 3, 9, 14, 17, 47, 22a
18 U.S.C. 2252A(b)(2) 3, 9, 17, 22a
18 U.S.C. 2254(8) 4
18 U.S.C. 2259 ..... 39, 32a

Statutes and guidelines—Continued: Page

18 U.S.C. 2259(b)(3)(A)-(F) 39
18 U.S.C. 2260(a)-(b) 3, 26a
18 U.S.C. 2260(c) 3, 27a
18 U.S.C. 2421-2428 (2012 & Supp. 2013) 21, 32a
Ala. Code (LexisNexis):
§ 13A-6-61(a)(1) (2005) 29
§ 13A-6-61(a)(2) (2005) 29
§ 13A-6-66 (Supp. 2014) 29
Alaska Stat. (2014):
§ 11.41.410(1) 29
§ 11.41.410(2) 29
§ 11.41.425(a)(2) 46
§ 11.41.425(a)(4)-(6) 46
§ 11.41.427(a)(1) 46
§ 11.41.427(a)(3)-(5) 46
Ariz. Rev. Stat. Ann.:
§ 13-1404 (2010) 29
§ 13-1406 (2010) 29
§ 13-1409(A) (Supp. 2014) 46
§ 13-1419 (Supp. 2014) 46
Ark. Code Ann. (Michie 2013):
§ 5-14-103(a)(1) 29
§ 5-14-103(a)(2) 29
§ 5-14-110(a)(3)(A) 46
§ 5-14-110(a)(4)(A) 46
§ 5-14-124(a)(1)(A) 46
§ 5-14-125(a)(4)(A)(i) 46
§ 5-14-126(a)(1)(A) 46
§ 5-14-126(a)(1)(B) 46
§ 5-14-127(a)(2) 46

Statutes and guidelines—Continued: Page

Cal. Penal Code (West 2014):
§ 261 29
§ 266c 29
Colo. Rev. Stat. (2014):
§ 18-3-402(1)(a)-(c) 29
§ 18-3-402(1)(f)-(h) 29
§ 18-3-402(f) 46
§ 18-3-404(1) 29
§ 18-3-404(f) 46
Conn. Gen. Stat. Ann. (West):
§ 53a-70(a)(1) (2012) 29
§ 53a-70(a)(3) (2012) 29
§ 53a-70(a)(4) (2012) 29
§ 53a-71(a)(5) (Supp. 2015) 46
Del. Code Ann. tit. 11 (Michie 2007):
§ 769(a)(1) 29
§ 773(a)(1)-(4) 29
Ga. Code Ann. § 16-6-1(a) (2011) 29
Haw. Rev. Stat. Ann. (LexisNexis Supp. 2014):
§ 707-730(1)(a) 29
§ 707-730(1)(d) 29
§ 707-730(1)(e) 29
§ 707-731(1)(c) 46
§ 707-732(e) 46
Idaho Code Ann. (Michie Supp. 2015):
§ 18-6101(3)-(9) 29
§ 18-6108(3)-(7) 29
§ 18-6110 46
720 Ill. Comp. Stat. Ann. (West Supp. 2015):
5/11-1.20(a)(1) 30

Statutes and guidelines—Continued: Page

5/11-1.20(a)(2) 30
5/11-1.30(a) 30
5/11-1.30(c) 30
Ind. Code Ann. (LexisNexis Supp. 2014):
§ 35-42-4-1 30
§ 35-42-4-8 30
Iowa Code Ann. (West):
§ 709.2 (2003) 30
§ 709.11 (Supp. 2015) 30
2011 Kan. Sess. Laws 148 30
Ky. Rev. Stat. Ann. (LexisNexis 2014):
§ 510.040(1)(a) 30
§ 510.040(1)(b)(1) 30
§ 510.060(1)(e) 46
§ 510.070(1)(a) 30
§ 510.070(1)(b)(1) 30
§ 510.090(1)(e) 46
§ 510.110(1)(a) 30
§ 510.110(1)(b)(1) 30
§ 510.110(1)(b)(3) 30
§ 510.120(1)(c) 46
La. Rev. Stat. Ann. (West):
§ 14:42.1 (2007) 30
§ 14:43 (Supp. 2015) 30
Me. Rev. Stat. Ann. tit. 17-A (Supp. 2014):
§ 253(1)(A) 30
§ 253(2)(A)-(D) 30
§ 253(2)(E) 46
Md. Code Ann., Crim. Law (LexisNexis 2012):
§ 3-303(a) 30

Statutes and guidelines—Continued: Page

§ 3-305(a) 30
§ 3-314(b) 46
Mass. Ann. Laws ch. 265, § 22 (LexisNexis 2010) 30
Mich. Comp. Laws Ann. (West Supp. 2015):
§ 750.520b(1)(c)-(g) 30
§ 750.520c(1)(i)-(*l*) 46
Minn. Stat. Ann.:
§ 609.342 Subdiv. 1(c)-(f) (2009) 30
§ 609.344 Subdiv. 1(m) (Supp. 2015) 46
§ 609.345 Subdiv. 1(m) (Supp. 2015) 46
Miss. Code Ann. (West 2011):
§ 97-3-95(1)(a) 30
§ 97-3-95(1)(b) 30
Mo. Ann. Stat. (West Supp. 2015):
§ 566.030(1) 30
§ 566.060(1) 30
§ 566.100 30
Mont. Code Ann. (2013):
§ 45-5-502(1) 30
§ 45-5-503(1) 30
Neb. Rev. Stat. Ann. (LexisNexis 2009):
§ 28-319(1)(a) 30
§ 28-319(1)(b) 30
§ 28-320 30
§ 28-322.01 46
§ 28-322.02 46
§ 28.322.03 46
Nev. Rev. Stat. Ann. § 200.366(1) (LexisNexis 2012) 30

Statutes and guidelines—Continued: Page

N.H. Rev. Stat. Ann. (LexisNexis 2015):
§ 632-A:2(I)(a)-(i) 30
§ 632-A:2(I)(m) 30
§ 632-A:2(I)(n) 30, 46
§ 632-A:3(I) 30
§ 632-A:3(IV) 30, 46
§ 632-A:4(III) 46
N.J. Stat. Ann. (West Supp. 2015):
§ 2C:14-2(a)(3)-(7) 30
§ 2C:14-2(c)(1) 30
§ 2C:14-2(c)(2) 30
N.M. Stat. Ann. (Supp. 2014):
§ 30-9-11(A) 30
§ 30-9-11(C) 30
§ 30-9-11(D)(2) 30
§ 30-9-11(E)(2)-(6) 30
§ 30-9-11(E)(2) 46
§ 30-9-11(F) 30
N.Y. Penal Law § 130.65 (McKinney Supp. 2015) 28
N.C. Gen. Stat. (2013):
§ 14-27.2(a)(2) 30
§ 14-27.4(a)(2) 30
§ 14-27.5 30
§ 14-27.5A 30
§ 14-27.7(a) 46
N.D. Cent. Code (2012):
§ 12.1-20-03(1)(a)-(c) 30
§ 12.1-20-03(1)(e) 30
§ 12.1-20-03(2)(b) 30
§ 12.1-20-03(2)(c) 30

Statutes and guidelines—Continued: Page

§ 12.1-20-04 30
§ 12.1-20-06 (2012) 46
§ 12.1-20-07(1)(a)-(d) 30
§ 12.1-20-07(1)(d) 46
Ohio Rev. Code Ann. (LexisNexis 2014):
§ 2907.02(A)(1)(a) 30
§ 2907.02(A)(1)(c) 30
§ 2907.02(A)(2) 30
§ 2907.03(A)(1)-(7) 30
§ 2907.03(A)(6) 46
§ 2907.03(A)(10)-(11) 30
§ 2907.03(A)(11) 46
§ 2907.05(A)(1)-(3) 30
§ 2907.05(A)(5) 30
§ 2907.06(A)(1)-(3) 30
§ 2907.06(A)(5) 30
Okla. Stat. Ann. tit. 21 (West 2015):
§ 888(B)(4) 46
§ 1114(A)(2)-(6) 30
Or. Rev. Stat. (2013):
§ 163.375(1)(a) 30
§ 163.375(1)(d) 30
§ 163.411(1)(a) 30
§ 163.411(1)(c) 30
§ 163.427(1)(a)(B) 30
§ 163.427(1)(a)(C) 30
18 Pa. Cons. Stat. Ann. (West):
§ 3121(a) (Supp. 2015) 30
§ 3123(a) (Supp. 2015) 30
§ 3124.1 (2000) 30

Statutes and guidelines—Continued: Page

§ 3124.2(a) (Supp. 2015) 30, 46
§ 3124.2(a)(a.1) (Supp. 2015) 46
§ 3125(a)(1)-(6) (Supp. 2015) 30
R.I. Gen. Laws:
§ 11-37-2 (2002) 30
§ 11-37-4 (Supp. 2014) 30
S.C. Code Ann.:
§ 16-3-652 (Supp. 2014) 30
§ 16-3-653 (2003) 30
§ 16-3-654 (2003) 30
S.D. Codified Laws:
§ 22-22-1(2)-(4) (Supp. 2015) 30
§ 22-22-7.2 (Supp. 2015) 30
§ 22-22-7.4 (2006) 30
Tenn. Code Ann. (2014):
§ 39-13-502 30
§ 39-13-503 30
§ 39-13-504(a)(1)-(3) 30
§ 39-13-505 30
Tex. Penal Code Ann. (West):
§ 22.011(a)(1) (2011) 30
§ 22.011(b)(11) (2011) 46
§ 22.021(a)(1)(A) (Supp. 2014) 30
§ 22.021(a)(2)(A) (Supp. 2014) 30
§ 22.021(a)(2)(C) (Supp. 2014) 30
Utah Code Ann. (LexisNexis):
§ 76-5-402 (Supp. 2014) 30
§ 76-5-402.2 (Supp. 2014) 30
§ 76-5-404 (2012) 30
§ 76-5-405 (Supp. 2014) 30

Statutes and guidelines—Continued: Page

Vt. Stat. Ann. tit. 13 (2009):
§ 3252(a) 30
§ 3252(b) 30
§ 3253(a)(1)-(7) 30
§ 3253(a)(9) 30
§ 3257 46
Va. Code Ann. (2014):
§ 18.2-61(A)(i) 30
§ 18.2-61(A)(ii) 30
§ 18.2-64.2 46
Wash. Rev. Code Ann. (West 2015):
§ 9A.44.040 30
§ 9A.44.050 30
§ 9A.44.060 30
W. Va. Code Ann. (LexisNexis 2014):
§ 61-8B-3(a)(1) 31
§ 61-8B-4 31
Wis. Stat. Ann. (West Supp. 2014):
§ 940.225 31
§ 940.225(2)(h) 46
§ 940.225(2)(i) 46
Wyo. Stat. Ann. (2013):
§ 6-2-302 31
§ 6-2-303 31
§ 6-2-303(a)(vii) 46
§ 6-2-304 31
United States Sentencing Guidelines § 2L1.2 33

Miscellaneous:
73 Am. Jur. 2d *Statutes* (2012) 19

Miscellaneous—Continued: Page

H.R. Rep. No. 536, 98th Cong., 1st Sess. (1983) 4
H.R. Rep. No. 557, 105th Cong., 2d Sess. (1998) 48
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Webster's Third New International Dictionary (1993) 45

In the Supreme Court of the United States

No. 14-8358

AVONDALE LOCKHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 9-24) is reported at 749 F.3d 148.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2014. A petition for rehearing was denied on October 16, 2014 (J.A. 8). The petition for a writ of certiorari was filed on January 14, 2015, and was granted on May 26, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2252(b)(2) of Title 18 of the United States Code provides:

> Whoever violates, or attempts or conspires to violate [18 U.S.C. 2252(a)(4)] shall be fined under this title or imprisoned not more than 10 years, or both,

> but * * * if such person has a prior conviction under this chapter [*i.e.*, chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. 2252(b)(2).

Other relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-33a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4). J.A. 25-26. The district court concluded that petitioner was subject to a mandatory minimum sentence of ten years of imprisonment under 18 U.S.C. 2252(b)(2), because he had a prior state-law conviction for aggravated sexual abuse. J.A. 45; see Presentence Investigation Report (PSR) ¶¶ 47-48. The court sentenced petitioner to ten years of imprisonment, to be followed by ten years of supervised release. J.A. 27-28, 50-51. The court of appeals affirmed. J.A. 9-24.

A. Statutory Background

1. Section 2252(b)(2) of Title 18 of the United States Code sets forth the statutory penalties for a

defendant convicted of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4). In general, a defendant who is convicted of a possession offense is subject to no minimum term of imprisonment and a statutory maximum term of ten years. 18 U.S.C. 2252(b)(2). If, however, the defendant has a prior conviction under, *inter alia*, "the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," then Section 2252(b)(2) imposes a mandatory minimum term of ten years of imprisonment and a maximum term of 20 years. *Ibid.* The issue in this case is whether the term "involving a minor or ward" modifies only "abusive sexual conduct," or whether it also modifies "aggravated sexual abuse" and "sexual abuse."

Recidivist enhancements with the same or similar language appear in the federal sentencing statutes for other child-pornography crimes. Section 2252(b)(1) is the sentencing provision for a variety of offenses related to the circulation of child pornography, referred to generally as receipt and distribution, in violation of 18 U.S.C. 2252(a)(1)-(3). Section 2251(e) is the sentencing provision for offenses involving the production of child pornography, in violation of 18 U.S.C. 2251(a)-(d). Section 2260(c) is the sentencing provision for foreign production, receipt, and distribution of child pornography for importation into the United States, in violation of 18 U.S.C. 2260(a)-(b). Finally, Section 2252A(b)(1) and (2) mirror the penalties in Section 2252(b)(1) and (2), respectively, for receipt, distribution, and possession offenses in violation of 18 U.S.C. 2252A(a), which covers materials meeting a statutory

definition of "child pornography." See 18 U.S.C. 2256(8).

2. For more than 30 years, "Congress has focused attention on the scope of child pornography offenses and the severity of penalties for child pornography offenders." U.S. Sentencing Comm'n, *The History of Child Pornography Guidelines* 6 (Oct. 2009) (*History of Child Pornography*).[1] Congress first regulated child pornography in 1978 by prohibiting the production of visual or print depictions of minors engaged in sexually explicit conduct and the commercial transportation, distribution, and receipt of child pornography that was obscene, punishable by up to ten years of imprisonment. Protection of Children Against Sexual Exploitation Act of 1977 (1977 Act), Pub. L. No. 95-225, § 2(a), 92 Stat. 7.[2] The 1977 Act was not widely used and resulted in few prosecutions. H.R. Rep. No. 536, 98th Cong., 1st Sess. 2 (1983).

Federal child-pornography laws expanded following this Court's decision in *New York* v. *Ferber*, 458 U.S. 747 (1982), which held that the First Amendment permits the States to prohibit the use of children in pornographic materials, even if the materials are not obscene. *Id.* at 756-758. After *Ferber*, Congress enacted the Child Protection Act of 1984 (1984 Act), Pub. L. No. 98-292, 98 Stat. 204, which prohibited the production and distribution of child pornography, regard-

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[1] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.

[2] The limited scope of the 1977 Act reflected First Amendment case law requiring a showing of obscenity as a condition precedent to regulation of pornography. See *Miller* v. *California*, 413 U.S. 15, 36-37 (1973).

less of whether it was obscene or had been produced for pecuniary purposes. § 4, 98 Stat. 204.

Congress further expanded the substantive criminal provisions related to child pornography after the Court's decision in *Osborne* v. *Ohio*, 495 U.S. 103 (1990), which held that States could outlaw private possession of child pornography that involved actual children. *Id.* at 111. After *Osborne*, Congress enacted the Child Protection Restoration and Penalties Enhancement Act of 1990 (1990 Act), Pub. L. No. 101-647, Tit. III, Subtit. B, 104 Stat. 4816, which banned, *inter alia*, possession of images of child pornography in the provision currently codified at 18 U.S.C. 2252(a)(4), punishable by a maximum term of five years of imprisonment. § 323(a), 104 Stat. 4818-4819.

3. From the outset, penalties for federal child-pornography crimes have included sentencing enhancements for defendants with prior convictions, and Congress has repeatedly expanded the list of convictions that trigger those recidivist enhancements.

a. The 1977 Act imposed a two-year mandatory minimum sentence for offenses related to the sale of obscene child pornography, and it increased the maximum sentence from ten to 15 years, if the offender had a prior conviction under "this section." § 2(a), 92 Stat. 8; 18 U.S.C. 2252(a) and (b) (1982). As the conduct prohibited by Section 2252(a) expanded to include the receipt and distribution of non-obscene child pornography in the 1984 Act, the reference to prior convictions under "this section" in the recidivist enhancement expanded accordingly. § 4, 98 Stat. 204. In the Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-591, Tit. VII, 100 Stat. 3341-74, Congress increased the mandatory minimum penalty for repeat

offenders from two to five years of imprisonment. § 704(b), 100 Stat. 3341-75.

In the Violent Crime Control and Law Enforcement Act of 1994 (1994 Act), Pub. L. No. 103-322, Tit. XVI, 108 Stat. 2036, Congress expanded the list of prior offenses that would trigger an enhanced penalty for receipt and distribution offenses under Section 2252(b)(1) from convictions under "this section" to any prior conviction under "this chapter or chapter 109A." § 160001(d), 108 Stat. 2037; see 18 U.S.C. 2252(b)(1) (1994). Offenses under "this chapter" referred to Chapter 110 of Title 18 of the United States Code, which is entitled "Sexual Exploitation and Other Abuse of Children" and includes the federal child-pornography crimes. See 18 U.S.C. 2251-2258 (1994). Chapter 109A prohibits federal "sexual abuse" offenses. See 18 U.S.C. 2241-2245 (1994).

b. Sentencing enhancements for prior state-law convictions were first added in the Child Pornography Prevention Act of 1996 (1996 Act), Pub. L. No. 104-208, § 121, 110 Stat. 3009-26. Congress expanded the list of prior convictions that would trigger the recidivist enhancement in Section 2252(b)(1) for receipt and distribution offenses—a list that had previously included only federal offenses under Chapters 110 and 109A—to include prior convictions "*under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward*, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." § 121(5), 110 Stat. 3009-30 (emphasis added). Congress also increased the statutory maximum for the Section 2252(b)(1) recidivist enhancement from 15 to 30 years of imprisonment. *Ibid.*

The 1996 Act also amended Section 2252(b)(2) to impose, for the first time, a recidivist enhancement for defendants convicted of possession offenses under Section 2252(a)(4). Congress imposed a two-year mandatory minimum sentence, and increased the maximum term of imprisonment from five to ten years, if a defendant convicted of possessing child pornography "ha[d] a prior conviction under [chapter 110] or chapter 109A, or under the laws of any State relating to the possession of child pornography." § 121(5), 110 Stat. 3009-30.

Two years later, Congress added offenses under Chapter 117 of Title 18 ("Transportation for Illegal Sexual Activity and Related Crimes") to the list of prior convictions that would trigger enhanced sentences for child-pornography offenses under Section 2252(b)(1) and (2). See Protection of Children From Sexual Predators Act of 1998 (1998 Act), Pub. L. No. 105-314, Tit. II, § 202(a)(1), 112 Stat. 2977. The 1998 Act also brought the list of state-law predicates that would trigger the recidivist enhancement for possession offenses under Section 2252(b)(2) into line with the state-law predicates triggering the enhancement for receipt and distribution offenses under Section 2252(b)(1). The list was expanded so that persons convicted of possession offenses who had prior state-law convictions relating to "*aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward*, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography" now also received enhanced sentences. § 202(a)(2), 112 Stat. 2977 (emphasis added); see 18 U.S.C. 2252(b)(2) (2000).

c. In 2003, Congress amended Section 2252(b)(1) and (2) by adding federal obscenity convictions under Chapter 71 of Title 18 and convictions under 10 U.S.C. 920, a provision of the Uniform Code of Military Justice relating to sexual assault, to the list of crimes that would trigger the recidivist enhancement under both provisions. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, Tit. V, § 507, 117 Stat. 683. Congress also increased the mandatory minimum sentence under Section 2252(b)(1) for recidivists convicted of receipt and distribution offenses from five to 15 years of imprisonment, and it increased the statutory maximum from 30 to 40 years. § 103(a)(1)(B)(ii) and (b)(1)(C)(iii), 117 Stat. 652-653. Congress also increased the mandatory minimum sentence under Section 2252(b)(2) for recidivists convicted of possession offenses from two to ten years of imprisonment, and it increased the statutory maximum from ten to 20 years. § 103(a)(1)(C)(ii) and (b)(1)(D), 117 Stat. 652-653.

In 2006, the qualifying prior offenses in Section 2252(b)(1) and (2) diverged again when Congress added prior convictions under 18 U.S.C. 1591 (prohibiting "Sex trafficking of children or by force, fraud, or coercion") and under state laws relating to the "sex trafficking of children" to the list of prior convictions that would trigger the recidivist enhancement for receipt and distribution offenses under Section 2252(b)(1), but not for possession offenses under Section 2252(b)(2). See Adam Walsh Child Protection and

Safety Act of 2006 (2006 Act), Pub. L. No. 109-248, Tit. II, § 206(b)(2), 120 Stat. 614.[3]

Section 2252(b)(2) currently requires a district court to sentence any person who is convicted of possessing child pornography under Section 2252(a)(4) to a minimum term of ten years of imprisonment, if that person:

> has a prior conviction under this chapter [*i.e.*, chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography.

18 U.S.C. 2252(b)(2).

B. Proceedings in Petitioner's Case

1. In November 2008, agents from United States Immigration and Customs Enforcement (ICE) learned that petitioner had recently wired $1000 to a

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[3] In the 1996 Act, Congress created 18 U.S.C. 2252A, which prohibits a variety of conduct including the receipt, distribution, and possession of materials meeting a statutory definition of child pornography. § 121(2)-(3), 110 Stat. 3009-28 to 3009-29. The sentencing provisions of Section 2252A(b)(1) (for receipt and distribution offenses) and 2252A(b)(2) (for possession offenses) mirrored the sentencing provisions of Section 2252(b)(1) and (2). See § 121(3), 110 Stat. 3009-29. Each time Congress amended Section 2252(b)(1) and (2), it made identical amendments to Section 2252A(b)(1) and (2), respectively. 1998 Act § 202(b)(1) and (2), 112 Stat. 2978; PROTECT Act §§ 103(a)(1)(D)(ii) and (E), 103(b)(1)(E)(iii) and (F), 507, 117 Stat. 652-653, 683; 2006 Act § 206(b)(3), 120 Stat. 614.

Russian money courier for a company that distributed child pornography. PSR ¶ 4. On June 2, 2010, ICE agents and United States postal inspectors sent petitioner a letter inviting him to visit a website where he could purchase child pornography. PSR ¶ 5. Petitioner responded, asking to buy six videos depicting children as young as nine years old engaging in sexually explicit conduct. PSR ¶¶ 6-17.

After obtaining a warrant to search petitioner's residence, agents conducted a controlled delivery of a package purporting to contain the videos that petitioner had ordered. J.A. 10. When petitioner accepted the package, the agents executed the search warrant. *Ibid.* On petitioner's laptop and external hard drive, the agents found more than 15,000 images and at least nine videos containing child pornography. *Ibid.*

2. A federal grand jury in the United States District Court for the Eastern District of New York returned an indictment charging petitioner with attempted receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1) (Count 1), and possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2) (Count 2). J.A. 10-11, 39-42. Petitioner pleaded guilty to Count 2 pursuant to a plea agreement that preserved his right to appeal if the district court imposed a ten-year mandatory minimum sentence under Section 2252(b)(2). J.A. 11, 14 n.2.

The PSR prepared by the Probation Office noted that petitioner had previously been convicted of first-degree sexual abuse under New York law after he pinned down and attempted to rape his adult girl-

friend. J.A. 11; PSR ¶¶ 47-48.[4] In light of that conviction, the PSR concluded that petitioner faced a ten-year mandatory minimum term of imprisonment pursuant to Section 2252(b)(2), and an increased statutory maximum of 20 years. PSR ¶ 87.

Petitioner argued that Section 2252(b)(2) did not apply in his case because his prior state-law conviction for first-degree sexual abuse did not involve a minor. J.A. 12, 45; 11-cr-00231 Docket entry No. 44, at 4 (Dec. 13, 2012) (sentencing memorandum). The district court overruled that objection. J.A. 45. The court explained that "the plain reading of the statute negates [petitioner's] * * * position" and that petitioner's prior conviction "fits within th[e] part of [Section 2252(b)(2)] that speaks of a state conviction for aggravated sexual abuse." *Ibid.* The court sentenced petitioner to ten years of imprisonment, to be followed by ten years of supervised release. J.A. 27-28, 50-51.

3. The court of appeals affirmed. J.A. 9-24. The court held that the phrase "involving a minor or ward" in Section 2252(b)(2) modifies only "abusive sexual conduct," and not "aggravated sexual abuse" or "sexual abuse." J.A. 10. Accordingly, the court held, "a sexual abuse conviction involving an adult victim constitutes a predicate offense" that triggers the ten-year

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[4] Petitioner stated that "after an argument, his girlfriend at the time accused him of rape" and that he pleaded guilty even though he did not rape her. PSR ¶ 48. Petitioner also had a previous New York conviction for third-degree assault with intent to cause physical injury after he struck a girlfriend in the face and body and choked her, causing substantial pain. PSR ¶¶ 45-46. In that case, too, petitioner claimed that the girlfriend had accused him of domestic assault after an argument and that he pleaded guilty even though he did not assault her. PSR ¶ 46.

mandatory minimum sentence provided in Section 2252(b)(2). *Ibid.*

a. The court of appeals stated that "the plain meaning [of Section 2252(b)(2)] is not pellucid," and the court therefore considered two competing canons of statutory interpretation: (i) the "last antecedent rule," under which "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows," J.A. 14-15 (quoting *United States* v. *Kerley*, 416 F.3d 176, 180 (2d Cir. 2005); and (ii) the "series qualifier" canon, which "provides that a modifier at the beginning or end of a series of terms modifies all the terms," J.A. 15 (quoting *United States* v. *Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012), cert. denied, 134 S. Ct. 235 (2013)).

The court of appeals explained that the last-antecedent rule, the rule advanced by the government, "generally applies absent a contrary indication of meaning." J.A. 15 (citing *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003)). The court further explained that applying the series-qualifier canon, as petitioner suggested, "would eliminate any distinction between 'sexual abuse involving a minor' and 'abusive sexual conduct involving a minor,'" since those two categories would "seemingly" cover the same conduct. J.A. 17. Petitioner's reading, the court explained, thus "run[s] up against the principle of statutory interpretation that '[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.'" *Ibid.* (brackets in original) (quoting *Bailey* v. *United States*, 516 U.S. 137, 146 (1995)).

The court of appeals nevertheless concluded that it could not "definitively determine by applying the

canons whether the phrase 'involving a minor or ward' modifies the entire category of state-law sexual abuse crimes or only 'abusive sexual conduct.'" J.A. 19. The court therefore turned to the remainder of Section 2252(b)(2) to determine "whether its overall scheme may shed light" on which state-law sexual-abuse offenses Congress intended to include as predicate offenses. *Ibid.*

b. The court of appeals noted that, immediately before the reference to state-law crimes, Section 2252(b)(2) imposes an identical ten-year mandatory minimum sentence on defendants who are convicted of possessing child pornography and have a prior federal conviction under "[chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice)." J.A. 19 (brackets in original) (citation omitted). The court explained that those provisions all "prohibit sexual conduct, including conduct that may have both minor and adult victims." *Ibid.* The court concluded that, "[l]ooking at [Section] 2252(b)(2) as a whole, * * * it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law." J.A. 20 (citation and internal quotation marks omitted).

The court of appeals further reasoned that petitioner's interpretation was undermined by comparing the language used to describe the predicate state sexual-abuse convictions with three of the federal predicate convictions included in Chapter 109A: 18 U.S.C. 2241 ("Aggravated sexual abuse"), 2242 ("Sexual abuse"), and 2243 ("Sexual abuse of a minor

or ward"). J.A. 23. The court explained that, under the federal statutes, "adult and minor victims are included under the first two provisions, while [Section] 2243 covers only minors and wards." *Ibid.* The court noted that, although the language used to describe predicate state-law convictions in Section 2252(b)(2) is not identical to the language used in those federal provisions, "it nonetheless suggests that Congress intended to impart a similar structure to state-law predicate offenses for purposes of this sentencing enhancement." *Ibid.*

c. The court of appeals acknowledged a statement in a Senate Report accompanying the 1996 Act indicating that penalties under Section 2252A(b)(1) would require a mandatory minimum sentence for "a repeat offender with a prior conviction under chapter 109A or 110 of title 18, *or under any State child abuse law* or law relating to the production, receipt or distribution of child pornography." J.A. 24 (emphasis added) (quoting S. Rep. No. 358, 104th Cong., 2d Sess. 9 (1996) (Senate Report)). The court stated that this "brief legislative history" did not "alter [its] conclusion." *Ibid.* The court added that resort to the rule of lenity was unwarranted because the statutory text allowed it "to make far more than a guess as to what Congress intended." *Ibid.* (citations and internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. The rule of the last antecedent provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003). Under a straightforward application of the last-antecedent rule, the modifier "involving a

minor or ward" should be read as applying only to the term that immediately precedes it—"abusive sexual conduct." 18 U.S.C. 2252(b)(2).

The statutory context confirms that reading of the statute. In addition to state-law predicates, Section 2252(b)(2) lists several federal convictions that will trigger the recidivist enhancement, many of which may have either minor or adult victims. And three of the federal predicates included in Section 2252(b)(2)—"[a]ggravated sexual abuse," "[s]exual abuse," and "[s]exual abuse of a minor or ward," 18 U.S.C. 2241-2243—correspond closely to the language Congress used to categorize state sexual-abuse offenses in Section 2252(b)(2). That context provides persuasive evidence that Congress intended for the term "involving a minor or ward" to modify only the last category of state sexual-abuse offenses. Indeed, the drafting history shows that when Congress added the relevant language to Section 2252(b)(1) in 1996, the state-law recidivist enhancement closely tracked the entire panoply of federal convictions that also triggered the same enhancement.

The interpretation indicated by the last-antecedent rule also promotes the purpose of the statute. Restricting the recidivist enhancement in Section 2252(b)(2) to only state sexual-abuse offenses involving minors or wards would eliminate as predicate offenses serious sexual-abuse crimes, and thereby contravene Congress's purpose to protect children by ensuring that child-pornography offenders who are convicted sexual predators serve longer prison terms. And under the categorical approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), petitioner's reading of the statute would also eliminate as predicate offenses

any conviction under a state law that did not require a minor or ward victim *as an element* of the offense.

II. The series-qualifier principle, on which petitioner relies, does not make sense in the context of Section 2252(b)(2). Petitioner admits that applying the series-qualifier principle would create two (of three) categories that are identical—"sexual abuse involving a minor or ward" and "abusive sexual conduct involving a minor or ward." That incongruity cannot reflect Congress's intention. And the language of a similar sentencing provision in 18 U.S.C. 2251(e) places the conjunction "or" in the list of state sexual-abuse offenses *after* "abusive sexual contact involving a minor or ward," reflecting that Congress did not view "involving a minor or ward" as a modifier appearing at the end of a list of slightly different, but overlapping terms.

Although the last-antecedent rule can be overcome by "other indicia of meaning," *Barnhart*, 540 U.S. at 26, petitioner has identified no persuasive evidence that Congress intended some other meaning. No anomaly appears when reading Section 2252(b)(2) according to the usual rule, and petitioner's attempts to find support for his interpretation in the drafting and legislative history of Section 2252(b)(2) and other statutes fall short. After considering the text, context, history, and purpose of Section 2252(b)(2), the meaning of the statute is clear, and there is no grievous ambiguity justifying the application of the rule of lenity.

ARGUMENT

I. SECTION 2252(b)(2) REQUIRES A MANDATORY MINIMUM SENTENCE OF TEN YEARS OF IMPRISONMENT IF A DEFENDANT CONVICTED OF POSSESING CHILD PORNOGRAPHY HAS A PRIOR STATE-LAW CONVICTION RELATING TO "AGGRAVATED SEXUAL ABUSE" OR "SEXUAL ABUSE," REGARDLESS OF WHETHER THE VICTIM IS A MINOR OR WARD

The question before the Court is whether the phrase "involving a minor or ward" in Section 2252(b)(2) modifies only the directly preceding term "abusive sexual conduct" or, alternatively, whether it also modifies the terms "aggravated sexual abuse" and "sexual abuse." 18 U.S.C. 2252(b)(2). The text, context, drafting history, and purpose of the statute all confirm that state-law offenses relating to "aggravated sexual abuse" and "sexual abuse" need not involve "a minor or ward" to trigger a mandatory minimum sentence under Section 2252(b)(2).[5]

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[5] In addition to the Second Circuit in this case, four other courts of appeals have concluded that the term "involving a minor or ward" in Section 2252(b)(2)—or in similar sentencing provisions contained in 18 U.S.C. 2252(b)(1), 2252A(b)(1) and (2)—modifies only "abusive sexual conduct." See *United States* v. *Mateen*, 764 F.3d 627, 633 (6th Cir. 2014) (en banc) (per curiam); *United States* v. *Spence*, 661 F.3d 194, 197-198 (4th Cir. 2011); *United States* v. *Hubbard*, 480 F.3d 341, 350 (5th Cir.), cert. denied, 552 U.S. 990 (2007); *United States* v. *Rezin*, 322 F.3d 443, 448 (7th Cir. 2003); see also *United States* v. *Sinerius*, 504 F.3d 737, 740, 744 (9th Cir. 2007) (concluding that prior conviction for sexual assault of a minor was an offense "relating to sexual abuse" and finding it unnecessary to determine whether the prior conviction was an offense relating to "abusive sexual conduct involving a minor" or "aggravated sexual abuse"), cert. denied, 552 U.S. 1211 (2008); *United States* v. *Becker*, 625 F.3d 1309, 1310-1311, 1312 n.3 (10th

A. Under The Rule Of The Last Antecedent, The Term "Involving A Minor Or Ward" In Section 2252(b)(2) Modifies Only "Abusive Sexual Conduct"

1. "[T]he language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *United States* v. *Turkette*, 452 U.S. 576, 593 (1981)). The analysis of Section 2252(b)(2)'s text properly begins with the rule of the last antecedent, which provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003); see *Jama* v. *ICE*, 543 U.S. 335, 343-344 (2005); *Federal Trade Comm'n* v. *Mandel Bros.*, 359 U.S. 385, 389-390 (1959).

Under the last-antecedent rule, "the series 'A or B with respect to C' contains two items: (1) 'A' and (2) 'B with respect to C.'" *Stepnowski* v. *Commissioner*, 456 F.3d 320, 324 n.7 (3d Cir. 2006). Unless the last-antecedent rule is "overcome by other indicia of meaning," it is "sensible as a matter of grammar" and should be applied. *Barnhart*, 540 U.S. at 26 (citation omitted); see William Strunk Jr. & E.B. White, *The Elements of Style* 28, 30 (4th ed. 2000) ("The position of the words in a sentence is the principal means of showing their relationship," and "[m]odifiers should come, if possible, next to the words they modify.").

Cir. 2010) (concluding that the issue remains open in that court notwithstanding *United States* v. *McCutchen*, 419 F.3d 1122 (2005)), cert. denied, 131 S. Ct. 2961 (2011); but see *United States* v. *Linngren*, 652 F.3d 868, 870 (8th Cir. 2011) (assuming that a prior state-law conviction for "sexual abuse" required "that the victim be a minor"), cert. denied, 132 S. Ct. 1594 (2012).

Applying the last-antecedent rule makes especially good sense where no comma separates the modifying phrase from the last antecedent. See generally *Osorio* v. *State Farm Bank, F.S.B.*, 746 F.3d 1242, 1257 (11th Cir. 2014); *Enron Creditors Recovery Corp.* v. *ALFA, S.A.B. DE C.V.*, 651 F.3d 329, 335-336 (2d Cir. 2011); *United States* v. *Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972); 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:33, at 494-503 (7th ed. 2014); 73 Am. Jur. 2d *Statutes* § 139, at 375 (2012).[6] The use of such a comma "indicate[s] that qualifying language is applicable to all of the preceding clauses," and its absence therefore signals the contrary conclusion. Robert J. Martineau & Michael B. Salerno, *Legal, Legislative, and Rule Drafting in Plain English* 68 (2005).[7]

2. Section 2252(b)(2) imposes a ten-year mandatory minimum sentence on a defendant convicted of possessing child pornography if the defendant has a prior conviction under any state law "relating to aggravated sexual abuse, sexual abuse, or abusive sexual

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[6] Although matters of punctuation are not dispositive, they remain "helpful" in determining congressional intent. J.A. 18 ("the lack of a separating comma * * * run[s] contrary to [petitioner's] interpretation" but "is not dispositive"); *Rezin*, 322 F.3d at 448 (noting that "[t]he punctuation [of Section 2252(b)(2)] is against [the defendant], though we do not regard that as determinative"); compare *United States* v. *Bass*, 404 U.S. 336, 340 n.6 (1971) (declining to "attach significance to an omitted comma"), with *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242-243 (1989) (relying on placement of commas in the statute).

[7] An example of such a construction appears in the Fifth Amendment to the U.S. Constitution: "nor [shall any person] be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

conduct involving a minor or ward." 18 U.S.C. 2252(b)(2). Under a straightforward application of the last-antecedent rule, the modifier "involving a minor or ward" should be read as applying only to the term that immediately precedes it—"abusive sexual conduct." Congress has given no textual clue, such as a comma before the modifier, indicating that the modifier applies to all three of the preceding terms. See *United States* v. *Mateen*, 764 F.3d 627, 631 (6th Cir. 2014) (en banc) (per curiam) (applying the last-antecedent rule to conclude that "involving a minor or ward" modifies only "abusive sexual conduct" in Section 2252(b)(2)). Accordingly, under the last-antecedent rule, the term "involving a minor or ward" does not modify prior state offenses relating to "aggravated sexual abuse" or "sexual abuse."

B. The Statutory Context Of Section 2252(b)(2) Confirms The Interpretation Indicated By The Last-Antecedent Rule

Construed in light of the last-antecedent rule, the language of Section 2252(b)(2) is clear. But if any ambiguity remains, the statutory context resolves it. *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (citation omitted).

1. In addition to identifying prior state-law convictions that will trigger a ten-year mandatory minimum sentence, Section 2252(b)(2) also lists the following federal convictions that will trigger the recidivist enhancement: convictions "under this chapter [*i.e.*, chapter 110], chapter 71, chapter 109A, or chapter

117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)." 18 U.S.C. 2252(b)(2).

The only category of federal crimes that consists exclusively of offenses against children is Chapter 110, which covers "sexual exploitation and other abuse of children," including the child-pornography statute under which petitioner was convicted. See 18 U.S.C. 2251-2260A (2012 & Supp. 2013). The other three chapters of Title 18, however, and article 120 of the Uniform Code of Military Justice, include crimes that may have either minor or adult victims. Chapter 71 covers "obscenity" crimes. See 18 U.S.C. 1460-1470. Chapter 109A covers "sexual abuse" crimes. See 18 U.S.C. 2241-2248. Chapter 117 covers "transportation for illegal sexual activity and related crimes." 18 U.S.C. 2421-2428 (2012 & Supp. 2013). And article 120 of the Uniform Code of Military Justice covers "rape and sexual assault generally." 10 U.S.C. 920.

Section 2252(b)(2) does not specify that a conviction under any of those federal statutes must involve a minor or ward to trigger the provision's ten-year mandatory minimum sentence. J.A. 20. Every court of appeals to have considered the question has held that Congress's inclusion of federal crimes that may involve adult victims in Section 2252(b)(2)'s list of predicate offenses is persuasive evidence that "involving a minor or ward" does not modify all three categories of state sexual-abuse crimes included in the statute. See *ibid.*; *Mateen*, 764 F.3d at 631-632; *United States* v. *Spence*, 661 F.3d 194, 197 (4th Cir. 2011); *United States* v. *Hubbard*, 480 F.3d 341, 350 (5th Cir.), cert. denied, 552 U.S. 990 (2007); *United States* v. *Rezin*, 322 F.3d 443, 448 (7th Cir. 2003).

2. Additional evidence from the structure of the statute supports the conclusion that "involving a minor or ward" modifies only the category of offenses to which it is attached. Chapter 109A of Title 18—one of the chapters for which a prior conviction will trigger the Section 2252(b)(2) recidivist enhancement—contains three federal statutes that closely resemble the three categories of state sexual-abuse offenses at issue here. Section 2241 prohibits "[a]ggravated sexual abuse," Section 2242 prohibits "[s]exual abuse," and Section 2243 prohibits "[s]exual abuse of a minor or ward." Except for Section 2241(c) (singling out some sexual conduct with minors as "[a]ggravated sexual abuse" that warrants a minimum 30-year term of imprisonment), Sections 2241 and 2242 encompass crimes against both adult and minor victims, and Section 2243 covers only crimes against minors and wards.

The strong similarity between those three federal statutes and the three categories of state sexual-abuse crimes listed in Section 2252(b)(2)—"aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct involving a minor or ward"—is persuasive evidence that Congress intended to capture prior state-law convictions for "aggravated sexual abuse" and "sexual abuse" involving adult victims in Section 2252(b)(2).[8] "[I]t would have been strange had Con-

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[8] Although the parallel between the federal crimes of "aggravated sexual abuse," "sexual abuse," and "sexual abuse of a minor or ward" in 18 U.S.C. 2241-2243 sheds light on Congress's intent to include crimes involving adult victims in the first two categories of state sexual-abuse offenses, the state-law offenses covered by Section 2252(b)(2) are generic offenses that are not defined by the federal statutes. The terms used to describe the generic state-law

gress on the one hand authorized heavier punishment for offenders who had a prior *federal* conviction for a sexual crime whether or not it involved a minor, and on the other hand insisted that if the prior conviction had been for a state offense, even one identical to one of the enumerated federal offenses, the victim had to be a minor." *Rezin*, 322 F.3d at 448; accord J.A. 20; *Mateen*, 764 F.3d at 632 ("The parallel between these three federal offenses and the three listed categories of state offenses * * * is inescapable."). Applying the last-antecedent rule to the list of state sexual-abuse offenses in Section 2252(b)(2) avoids this anomalous result and ensures that a defendant with a prior conviction under state law for "aggravated sexual abuse" or "sexual abuse" involving an adult victim will receive the same enhanced statutory penalty as a defendant with a prior conviction under a federal statute prohibiting the sexual abuse of adult victims.

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offenses carry their ordinary, contemporary, and common meaning. See *United States* v. *Barker*, 723 F.3d 315, 319-320, 322-323 (2d Cir. 2013) (per curiam); *United States* v. *Gilbert*, 425 Fed. Appx. 212, 216 (4th Cir. 2011) (per curiam); *United States* v. *Sonnenberg*, 556 F.3d 667, 670-671 (8th Cir. 2009); *United States* v. *Morehouse*, 318 Fed. Appx. 87, 90 (3d Cir.) (per curiam), cert. denied, 558 U.S. 886 (2009); *Sinerius*, 504 F.3d at 740-742; *Hubbard*, 480 F.3d at 348-350; *United States* v. *Harding*, 172 Fed. Appx. 910, 913-914 (11th Cir.), cert. denied, 549 U.S. 847 (2006); see also *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993) ("Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'") (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)); but see *United States* v. *Osborne*, 551 F.3d 718, 720-721 (7th Cir. 2009) (concluding that "sexual behavior is 'abusive' [under Section 2252(b)(1)] only if it is similar to one of the crimes denominated as a form of 'abuse' elsewhere in Title 18").

C. The Drafting History Of Section 2252(b)(2) Supports The Conclusion That Congress Intended To Include Both Federal And State Sexual-Abuse Offenses Involving Adult Victims In The Recidivist Enhancement

The drafting history of Section 2252(b)(2) provides further proof of Congress's intent to limit "involving a minor or ward" to the last category listed in the phrase at issue here.

The language adding state-law predicates to the sentencing provisions for federal child-pornography crimes first appeared in Section 2252(b)(1)—the sentencing provision for offenses involving the receipt and distribution of child pornography. 1996 Act § 121(5), 110 Stat. 3009-30. At the time, Section 2252(b)(1) already included a recidivist enhancement for defendants with a prior conviction "under this chapter [*i.e.*, chapter 110] or chapter 109A." 18 U.S.C. 2252(b)(1) (1994). Chapter 110 contained the federal child-pornography laws, see 18 U.S.C. 2251-2258 (1994), including laws that prohibited the production (Section 2251), possession (Section 2252(a)(4)), receipt (Section 2252(a)(2)), mailing (Section 2252(a)(1)), sale (Section 2252(a)(3)), distribution (Section 2252(a)(2)), shipment (Section 2252(a)(1)), and transportation (Section 2252(a)(1)) of child pornography. And Chapter 109A contained federal sexual-abuse laws, see 18 U.S.C. 2241-2248 (1994), including "[a]ggravated sexual abuse" (Section 2241), "[s]exual abuse" (Section 2242), and "[s]exual abuse of a minor or ward" (Section 2243).

The 1996 Act added prior convictions under (i) state laws relating to "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography"; and (ii) state laws

relating to "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," to the list of predicate offenses under Section 2252(b)(1). § 121(5), 110 Stat. 3009-30.

The state offenses that Congress added to the list of Section 2252(b)(1) predicates in the 1996 Act reflect obvious parallels to the federal offenses that had made up that list for the previous two years—*i.e.*, offenses under Chapters 110 and 109A. J.A. 20; *Mateen*, 764 F.3d at 632; *Rezin*, 322 F.3d at 448; see 1994 Act § 160001(d), 108 Stat. 2037. That drafting history strongly indicates that Congress did not intend to limit state sexual-abuse offenses that would trigger the recidivist enhancement to only those involving statutes protecting minors or wards.

D. Applying The Last-Antecedent Rule Promotes The Purpose Of Section 2252(b)(2)

1. For more than 30 years, Congress has repeatedly acted to protect children and has "expressed its will regarding appropriate penalties for child pornography offenders" by broadening the substantive child-pornography crimes, by expanding the lists of predicate offenses that will trigger recidivist enhancements, and by repeatedly increasing the mandatory minimum and statutory maximum sentences applicable to such offenses. *History of Child Pornography* 6; see pp. 4-9, *supra*. Congress has not limited the predicate offenses that trigger recidivist enhancements solely to crimes against children, see pp. 20-23, *supra*, and Congress could reasonably presume that child-pornography offenders who have committed any of the prior offenses it listed in the recidivist enhancements—including those who have been convicted of sexually abusing adults—pose an enhanced risk of

committing further sex offenses against children (in addition to the child-pornography crimes they have already necessarily committed).

Restricting the recidivist enhancement in Section 2252(b)(2) to only state convictions under laws protecting minors or wards would eliminate as predicates serious sexual-abuse crimes, and thereby contravene Congress's purpose to protect children by ensuring that child-pornography offenders who are convicted sexual predators serve longer prison terms. The statute should not be interpreted to reach that result. See generally *Securities & Exch. Comm'n* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-351 (1943) (rules "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose").

2. Furthermore, restricting the recidivist enhancement to state sexual-abuse crimes "involving a minor or ward" could eliminate a huge number of serious sexual-abuse crimes *against minors* as predicate offenses.

a. Under the categorical approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), sentencing courts may look only to the statutory definition of a defendant's prior offense, and not to the particular facts of the underlying conviction, to determine whether a state conviction qualifies as a predicate offense under Section 2252(b)(2). See *id.* at 600. "[I]f the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as a[] * * * predicate, even if the defendant actually committed the offense in its generic form. The key * * * is elements, not facts." *Descamps* v. *United States*, 133 S. Ct. 2276, 2283 (2013).

In *Descamps*, the Court clarified that if a statute is overbroad but "divisible," *i.e.*, the statute comprises multiple, alternative versions of the crime, one or more of which would match or subsume the generic offense and one or more of which would not, then the sentencing court may apply a "modified categorical approach" and look to a limited set of materials to determine if the defendant had been convicted of a variant that matches the relevant generic offense. 133 S. Ct. at 2283-2284; see *Shepard* v. *United States*, 544 U.S. 13, 26 (2005). If the statute is "indivisible," however, *i.e.*, it does not contain alternative bases for conviction and criminalizes a broader swath of conduct than the relevant generic offense, the inquiry ends and the prior conviction cannot be used to trigger the enhancement. *Descamps*, 133 S. Ct. at 2285-2286.

b. Under petitioner's reading of the statute, to trigger Section 2252(b)(2)'s recidivist enhancement, a defendant must have a prior conviction for the generic offense of "aggravated sexual abuse involving a minor or ward," "sexual abuse involving a minor or ward," or "abusive sexual conduct involving a minor or ward." Under the modified categorical approach, only state sexual-abuse statutes (or variants of divisible statutes) that *require a minor or ward victim as an element* would trigger the recidivist enhancement under petitioner's reading.[9]

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[9] The most natural reading of the statutory language is that "involving a minor or ward" is an element of the generic crime of "abusive sexual conduct involving a minor or ward." See *United States* v. *Mateen*, 739 F.3d 300, 306-308 (6th Cir. 2014). If the Court reads the statute as petitioner suggests, however, so that "involving a minor or ward" modifies all three categories of state sexual-abuse offenses, that would raise the question whether

Take, for example, the current version of the New York statute under which petitioner was convicted. See Pet. Br. 5. New York Penal Law § 130.65 (McKinney Supp. 2015) provides:

> A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact:
>
> 1. By forcible compulsion; or
>
> 2. When the other person is incapable of consent by reason of being physically helpless; or
>
> 3. When the other person is less than eleven years old; or
>
> 4. When the other person is less than thirteen years old and the actor is twenty-one years old or older.

Ibid. Consider a defendant who forcibly rapes his 14-year old daughter and is convicted under this statute. Under the modified categorical approach, the conviction could not be used to justify a recidivist enhancement under Section 2252(b)(2).

The New York statute covers crimes against both adult and minor victims, so it criminalizes a broader swath of conduct than the elements of any generic offense that requires a minor victim as an element.

"involving a minor or ward" should instead be read as a circumstance-specific inquiry that must be proved beyond a reasonable doubt (but need not be a defining element of the offense), because otherwise petitioner's reading would "frustrate Congress' manifest purpose" by eliminating a huge number of serious sexual-abuse crimes against minors as predicate offenses. *United States* v. *Hayes*, 555 U.S. 415, 427 (2009); see *Nijhawan* v. *Holder*, 557 U.S. 29, 39-40 (2009).

The statute is divisible, but the hypothetical defendant was convicted under variant 1. Because variant 1 covers forcible sexual contact with both adult and minor victims, it does not categorically prohibit "aggravated sexual abuse involving a minor or ward," "sexual abuse involving a minor or ward," or "abusive sexual conduct involving a minor or ward."[10]

The modified categorical approach is "applicable only to divisible statutes." *Descamps*, 133 S. Ct. at 2284. Petitioner's reading of Section 2252(b)(2) would therefore eliminate as predicates any convictions under indivisible state statutes (or variants of divisible statutes) that prohibit sexual abuse in general against any person, *even if the victim is a minor or ward.*[11] That cannot be what Congress intended.

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[10] The defendant in *Mateen* provides another example. Before the Sixth Circuit granted rehearing en banc and interpreted Section 2252(b)(2) according to the last-antecedent rule, the court of appeals had concluded that the defendant, who was convicted of possessing child pornography and had a prior conviction under Ohio law for "gross sexual imposition" upon an eight-year-old girl, was not subject to the recidivist enhancement because he had pleaded guilty to a variant of the Ohio statute that did not "include[] the age of the victim as an element of the offense." *Mateen*, 739 F.3d at 306-308.

[11] Numerous state laws are indivisible statutes or variants of divisible statutes that prohibit sexual abuse in general against any person. See, *e.g.*, Ala. Code §§ 13A-6-61(a)(1) and (2), 13A-6-66 (LexisNexis 2005 & Supp. 2014); Alaska Stat. § 11.41.410(1) and (2) (2014); Ariz. Rev. Stat. Ann. §§ 13-1404, 13-1406 (2010); Ark. Code Ann. § 5-14-103(a)(1) and (2) (2013); Cal. Penal Code §§ 261, 266c (West 2014); Colo. Rev. Stat. §§ 18-3-402(1)(a)-(c) and (f)-(h), 18-3-404(1) (2014); Conn. Gen. Stat. Ann. § 53a-70(a)(1), (3), and (4) (West 2012); Del. Code Ann. tit. 11, §§ 769(a)(1), 773(a)(1)-(4) (Michie 2007); Ga. Code Ann. § 16-6-1(a) (2011); Haw. Rev. Stat. Ann. § 707-730(1)(a), (d), and (e) (LexisNexis Supp. 2014); Idaho

Code Ann. §§ 18-6101(3)-(9), 18-6108(3)-(7) (Michie Supp. 2015); 720 Ill. Comp. Stat. Ann. §§ 5/11-1.20(a)(1) and (2), 5/11-1.30(a) and (c) (West Supp. 2015); Ind. Code Ann. §§ 35-42-4-1, 35-42-4-8 (LexisNexis Supp. 2014); Iowa Code Ann. §§ 709.2, 709.11 (West 2003 & Supp. 2015); 2011 Kan. Sess. Laws 148, § 29(1)-(2) and (4)-(5); Ky. Rev. Stat. Ann. §§ 510.040(1)(a) and (b)(1), 510.070(1)(a) and (b)(1), 510.110(1)(a), (b)(1), and (3) (LexisNexis 2014); La. Rev. Stat. Ann. §§ 14:42.1, 14:43 (West 2007 & Supp. 2015); Me. Rev. Stat. Ann. tit. 17-A, § 253(1)(A) and (2)(A)-(D) (Supp. 2014); Md. Code Ann., Crim. Law §§ 3-303(a), 3-305(a) (LexisNexis 2012); Mass. Ann. Laws ch. 265, § 22 (LexisNexis 2010); Mich. Comp. Laws Ann. § 750.520b(1)(c)-(g) (West Supp. 2015); Minn. Stat. Ann. § 609.342 Subdiv. 1(c)-(f) (2009); Miss. Code Ann § 97-3-95(1)(a) and (b) (West 2011); Mo. Ann. Stat. §§ 566.030(1), 566.060(1), 566.100 (West Supp. 2015); Mont. Code Ann. §§ 45-5-502(1), 45-5-503(1) (2013); Neb. Rev. Stat. Ann. §§ 28-319(1)(a) and (b), 28-320 (LexisNexis 2009); Nev. Rev. Stat. Ann. § 200.366(1) (LexisNexis 2012); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(a)-(i), (m) and (n), 632-A:3(I) and (IV) (LexisNexis 2015); N.J. Stat. Ann. § 2C:14-2(a)(3)-(7), (c)(1), and (2) (West Supp. 2015); N.M. Stat. Ann. § 30-9-11(A), (C), (D)(2), (E)(2)-(6) and (F) (Supp. 2014); N.C. Gen. Stat. §§ 14-27.2(a)(2), 14-27.4(a)(2), 14-27.5, 14-27.5A (2013); N.D. Cent. Code §§ 12.1-20-03(1)(a)-(c), (e), (2)(b), and (c), 12.1-20-04, 12.1-20-07(1)(a)-(d) (2012); Ohio Rev. Code Ann §§ 2907.02(A)(1)(a), (c), and (2), 2907.03(A)(1)-(7) and (10)-(11), 2907.05(A)(1)-(3) and (5), 2907.06(A)(1)-(3) and (5) (LexisNexis 2014); Okla. Stat. Ann. tit. 21, § 1114(A)(2)-(6) (West 2015); Or. Rev. Stat. §§ 163.375(1)(a) and (d), 163.411(1)(a) and (c), 163.427(1)(a)(B) and (C) (2013); 18 Pa. Cons. Stat. Ann. §§ 3121(a), 3123(a), 3124.1, 3125(a)(1)-(6) (West 2000 & Supp. 2015); R.I. Gen. Laws §§ 11-37-2, 11-37-4 (2002 & Supp. 2014); S.C. Code Ann. §§ 16-3-652, 16-3-653, 16-3-654 (2003 & Supp. 2014); S.D. Codified Laws §§ 22-22-1(2)-(4), 22-22-7.2, 22-22-7.4 (2006 & Supp. 2015); Tenn. Code Ann. §§ 39-13-502, 39-13-503, 39-13-504(a)(1)-(3), 39-13-505 (2014); Tex. Penal Code Ann. §§ 22.011(a)(1), 22.021(a)(1)(A), (2)(A), and (C) (West 2011 & Supp. 2014); Utah Code Ann. §§ 76-5-402, 76-5-402.2, 76-5-404, 76-5-405 (LexisNexis 2012 & Supp. 2014); Vt. Stat. Ann. tit. 13, §§ 3252(a) and (b), 3253(a)(1)-(7) and (9) (2009); Va. Code Ann. § 18.2-61(A)(i) and (ii)

II. PETITIONER'S ALTERNATIVE CONSTRUCTION OF SECTION 2252(b)(2)'S RECIDIVIST ENHANCEMENT LACKS MERIT

Petitioner contends that the term "involving a minor or ward" in Section 2252(b)(2) modifies all three of the terms that precede it—"aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct." He contends (Br. 11-21) that the statute should be read according to the series-qualifier principle, an alternative canon of statutory construction that favors his preferred result. Petitioner contends that the drafting history (Br. 22-29, 33-34, 35-38) and the legislative history (Br. 29-33) of Section 2252(b)(2) or similar statutes provide the "other indicia of meaning," *Barnhart*, 540 U.S. at 26, necessary to overcome the last-antecedent rule by showing that Congress intended to limit all state sexual-abuse predicates to those involving minors or wards as victims. Finally, petitioner contends (Br. 39-43) that the Court should apply the rule of lenity. Each of petitioner's arguments should be rejected.

A. The Series-Qualifier Principle Does Not Apply

Petitioner contends (Br. 11-21) that the list of state sexual-abuse offenses in Section 2252(b)(2) should be read according to the series-qualifier principle. According to petitioner, that principle applies where: (1) the modifying clause is "applicable as much to the first and other words as to the last," and (2) the modifying clause appears at the end of a "single, integrated

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(2014); Wash. Rev. Code Ann. §§ 9A.44.040, 9A.44.050, 9A.44.060 (West 2015); W. Va. Code Ann. §§ 61-8B-3(a)(1), 61-8B-4 (LexisNexis 2014); Wis. Stat. Ann. § 940.225 (West Supp. 2014); Wyo. Stat. Ann. §§ 6-2-302, 6-2-303, 6-2-304 (2013).

list." Pet. Br. 12 (quoting *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920) (*Porto Rico Railway*), and *Jama*, 543 U.S. at 344 n.4). Neither of those criteria is satisfied here.

1. Applying the modifier "involving a minor or ward" to all three categories of state sexual-abuse offenses does not make sense

Petitioner contends (Br. 13-14) that the Court should apply the series-qualifier principle because the modifier "involving a minor or ward" makes sense with all three categories of state sexual-abuse offenses listed in the statute. It is true that "aggravated sexual abuse involving a minor or ward" and "sexual abuse involving a minor or ward" are potential state-law crimes. But it would not be reasonable to conclude that Congress intended to limit "aggravated sexual abuse" or "sexual abuse" to crimes involving a minor or ward.

Under petitioner's construction of the statute, Section 2252(b)(2)'s recidivist enhancement would apply to state offenses involving (1) aggravated sexual abuse involving a minor or ward; (2) sexual abuse involving a minor or ward; and (3) abusive sexual conduct involving a minor or ward. Petitioner *concedes* that the second and third categories are identical. Pet. Br. 17 ("the ordinary meaning of 'abusive sexual conduct' is the same as the ordinary meaning of sexual abuse"); *ibid.* ("any fine distinction in meaning" between the categories "is eliminated by the broadening statutory phrase 'relating to'"); see J.A. 17 ("'abusive sexual conduct involving a minor' seemingly would encompass anything that constitutes 'sexual abuse involving a minor.'"). Petitioner makes no attempt to explain why Congress would have separately listed two identi-

cal categories of state sexual-abuse offenses in Section 2252(b)(2)'s recidivist enhancement, and his interpretation therefore runs up against the presumption against surplusage. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001).

Petitioner claims (Br. 34-35) that the rule against surplusage should not apply because the first category of state-law offenses, *i.e.*, "aggravated sexual abuse," is unnecessary under any interpretation of the statute. Although "aggravated sexual abuse" (and "abusive sexual conduct involving a minor or ward") are properly viewed as subsets of the generic offense of "sexual abuse," the inclusion of those terms serves the important purpose of clarifying that Congress wanted the recidivist enhancement to apply to those specialized and particularly serious types of "sexual abuse" offenses, as well as to statutes more generally prohibiting sexual abuse. See *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 137 (2007) ("[O]ur hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity.").

Furthermore, the inclusion of "abusive sexual conduct involving a minor or ward" as a separate category removes any doubt that Congress wanted to include offenses that, similar to 18 U.S.C. 2243, may involve consensual sexual conduct but are nevertheless illegal because of the nature of the victim. See, *e.g.*, *United States* v. *Rodriguez*, 711 F.3d 541, 559, 561 (5th Cir.) (en banc) (concluding that the generic definition of "statutory rape" for purposes of Sentencing Guide-

lines § 2L1.2 is "unlawful sexual intercourse with a person under the age of consent * * * regardless of whether it is against that person's will") (citation and brackets omitted), cert. denied, 134 S. Ct. 512 (2013). The redundancy created by petitioner's reading, on the other hand, is inexplicable.

Petitioner further suggests (Br. 35) that redundant language in statutes is not unusual and that Section 2252(b)(2) contains additional redundant language, such as the list of state child-pornography predicates—prior convictions relating to the "production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." See 18 U.S.C. 2252(b)(2). None of those terms, however, is purely synonymous with the others, unlike the redundancy created by petitioner's interpretation.

2. Section 2252(b)(2) does not contain an "integrated" list

a. Petitioner further contends (Br. 15-18) that the Court should read Section 2252(b)(2) in light of the series-qualifier principle because that canon is typically applied where the language in question is a "single, integrated list" of related terms, such as, "receives, possesses, or transports." *Id.* at 15 (quoting *Jama*, 543 U.S. at 344 n.4). Petitioner defines an "integrated" list as one requiring "slightly different, but overlapping[]" meanings. *Ibid.* The statutory language that precedes the modifier in Section 2252(b)(2) is not a list consisting of terms that have slightly different, overlapping meanings. As explained above, see pp. 32-34, *supra*, unless the modifier is applied only to the last category, the second and third categories—"sexual abuse" and "abusive sexual conduct"—are identical rather than "overlapping."

That feature distinguishes the language at issue from "receives, possesses, or transports," the "integrated list" on which petitioner principally relies. Pet. Br. 15 (citation omitted). The difference between a list containing distinct words that are similar or "overlapping" in meaning and one containing two phrases that bear the identical meaning is substantial. Take petitioner's example of a menu that lists a "cheeseburger, hamburger, or turkey burger with fries." *Id.* at 19. Petitioner notes that "[d]iners would expect fries to come with any of the three burgers, not just the last." *Ibid.* But if the list read "cheeseburger, hamburger, or hamburger with fries," the diner would not expect all burgers to come with fries. The statutory language preceding "involving a minor or ward" is not, under petitioner's own definition, an "integrated" list of separate but related terms.

Petitioner also suggests (Br. 18) that "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" are an "interconnected whole" or "unit" composed of synonyms. Petitioner cites *United States* v. *Olano*, 507 U.S. 725, 731, 732 (1993), in which this Court concluded that the phrase "[p]lain errors or defects affecting substantial rights" did not create "two separate categories—'plain errors' and 'defects affecting substantial rights'"—because "the phrase 'error or defect' is more simply read as 'error.'" *Ibid.* (citation omitted) (citing *United States* v. *Young*, 470 U.S. 1, 15 n.12 (1985)). The Court's reasoning in *Olano* has no application here because the list that precedes "involving a minor or ward" includes "aggravated sexual abuse," which is not synonymous with either "sexual abuse" or "abusive sexual conduct."

b. Furthermore, the text of another child-pornography sentencing provision, 18 U.S.C. 2251(e), undermines petitioner's inference that Congress intended "involving a minor or ward" to modify all the categories preceding it. J.A. 16 n.3. Section 2251(e) is the sentencing provision for Section 2251, which is entitled "[s]exual exploitation of children" and prohibits the production of visual depictions of minors engaging in sexually explicit conduct. Between 1996 and 2006, the only state-law convictions included as predicates that would trigger the recidivist enhancement in Section 2251 were those under state laws "relating to the sexual exploitation of children." 1996 Act § 121(4), 110 Stat. 3009-30.

In the 2006 Act, Congress expanded the list of predicates in Section 2251(e) to include state laws relating to "*aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children*, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." § 206, 120 Stat. 614 (emphasis added). By placing the "or" in the italicized sublist *after* "abusive sexual contact involving a minor or ward," the modifier no longer appears at the end of a list of state sexual-abuse offenses, but in the middle of a longer sublist. J.A. 16 n.3.

Petitioner does not contend that Section 2251(e) can be read so that "aggravated sexual abuse" and "sexual abuse" are modified by the term "involving a minor or ward." Instead, he contends (Br. 38 n.10) that the term "involving a minor or ward" in Section 2251(e) *does not* modify "aggravated sexual abuse" and "sexual abuse," but that the views of the Congress acting in 2006 should not inform what an earlier Con-

gress meant when it used similar language in Section 2252(b)(2). The Court should reject the view that Congress intended such an incongruity between the similar sentencing provisions in Sections 2251(e) and 2252(b)(2).

Petitioner further notes (Br. 38 n.10) that Congress used different language in Section 2251(e) (it used the term "abusive sexual *contact*" instead of "abusive sexual *conduct*"), and he notes that when different language is used, one can assume that Congress meant something different. Whatever the reason for using the word "contact" instead of "conduct" in Section 2251(e), it does not explain why Congress placed the conjunction "or" *after* "abusive sexual contact involving a minor or ward," reflecting Congress's understanding that the term "involving a minor or ward" does not modify "aggravated sexual abuse" or "sexual abuse."

B. No "Other Indicia Of Meaning" Show That Congress Intended The Interpretation Suggested By The Series-Qualifier Principle

The grammatical presumption underlying the last-antecedent rule is, of course, "not an absolute" and can be overcome by "other indicia of meaning." *Barnhart*, 540 U.S. at 26. Petitioner has failed, however, to identify any persuasive evidence that Congress intended for the term "involving a minor or ward" to modify "aggravated sexual abuse" and "sexual abuse."

1. The rule of the last antecedent produces a more reasonable interpretation of Section 2252(b)(2) than does the series-qualifier principle

Petitioner states (Br. 19-20) that the Court should not engage in a "wooden application" of the last-

antecedent rule when it would require the Court to accept an unlikely premise. But petitioner never explains why the interpretation suggested by the last-antecedent rule is unlikely. The last-antecedent rule produces an interpretation of the statute that is based on the sensible premise that Congress intended state sexual-abuse predicates to cover conduct similar to their federal-law counterparts in Chapter 109A, an interpretation that promotes the purpose of the statute—to keep children safe by placing child-pornography offenders who are convicted sexual predators in prison for longer periods of time.

Petitioner cites a handful of decisions (Br. 13-14) where the Court has declined to apply the last-antecedent rule because it would require accepting an "unlikely premise[]," *United States* v. *Hayes*, 555 U.S. 415, 425-426 (2009), or because the series-qualifier principle suggested a "more reasonable" interpretation than the one produced by the usual rule, *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 330-332 (1993). In *Porto Rico Railway*, the Court construed a statute granting district courts jurisdiction over cases where all parties "are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Porto Rico." 253 U.S. at 346 (citation omitted). The Court concluded that the phrase "not domiciled in Porto Rico" modified not only "citizens of a State, Territory, or District of the United States" but also "citizens or subjects of a foreign State or States." *Id.* at 349. The Court explained that the statute "manifest[ed] a general purpose to greatly curtail the jurisdiction of the District Court" and that the alternative construction would be inconsistent with a treaty with Spain and

would cause "assuredly unintended discrimination." *Id.* at 348-349.

In *United States* v. *Bass*, 404 U.S. 336 (1971), the Court construed former 18 U.S.C. App. 1202(a), at 4474 (1970), a predecessor to 18 U.S.C. 922(g) that imposed criminal penalties on any person within specified categories who "receive[d], possesse[d], or transport[ed] in commerce or affecting commerce any firearm." 404 U.S. at 337 (citation omitted). The Court held that "in * * * or affecting commerce" modified possession (and not just transportation) because a federal prohibition on the possession of firearms without any link to interstate commerce would "effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* at 349.

And in *Paroline* v. *United States*, 134 S. Ct. 1710 (2014), the Court construed 18 U.S.C. 2259, which sets forth five specific categories of loss for which restitution is mandatory for victims of certain child exploitation offenses (*i.e.*, medical services; physical and occupational therapy; transportation, housing, and child care expenses; lost income; and attorneys' fees and costs), as well as "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3)(A)-(F). The Court declined to apply the last-antecedent rule "in a mechanical way" and concluded instead that the statute requires proximate cause for all six categories of loss. *Paroline*, 134 S. Ct. at 1720; *id.* at 1731-1735 (Roberts, C.J., dissenting); *id.* at 1735-1736 (Sotomayor, J., dissenting). The Court relied on a canon of statutory construction relating to catchall clauses that does not apply here, and it further noted that "[r]eading the statute to

impose a general proximate-cause limitation accords with common sense"; that "[p]roximate cause is a standard aspect of causation in criminal law and the law of torts"; and that it "might well hold that a showing of proximate cause was required" even if the statute made no reference to it. *Id.* at 1720-1722.

Unlike in those cases, petitioner can point to nothing about the interpretation produced by the last-antecedent rule that is unlikely. Instead, it is his reading of the statute that would require the Court to accept the premise that Congress drafted state-law predicates that closely resemble federal crimes under Chapter 109A, but intended to limit those predicates to convictions under state sexual-abuse statutes that require the victim to be a minor or ward. The Court would also need to accept that, in doing so, Congress wrote a statute that lists three categories of state sexual-abuse offenses, two of which are the same.

2. The drafting history does not support petitioner's reading

Unable to show that his interpretation of Section 2252(b)(2) is more reasonable than the interpretation suggested by the usual rule, petitioner contends (Br. 22-27) that the drafting history of the federal child-pornography laws shows that Congress "deliberate[ly]" limited all state-law predicates in child-pornography recidivist enhancements to offenses involving minors. *Id.* at 22. Petitioner's view of the drafting history is misconceived.

a. i. The lists of predicate offenses that will trigger recidivist enhancements for federal child-pornography crimes were created over a period of years. In 1994, the list of predicate offenses that would trigger the enhancement for receipt and distri-

bution offenses under Section 2252(b)(1) included only federal crimes under Chapters 110 and 109A of Title 18. See 1994 Act, § 160001(d), 108 Stat. 2037. Because Chapter 110 covers the federal child-pornography crimes, see 18 U.S.C. 2251-2258 (1994), the state-law counterparts added to the list in the 1996 Act—state laws relating to "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography"—necessarily were limited to crimes against minors. See § 121(5), 110 Stat. 3009-30. Chapter 109A, in contrast, covers sexual-abuse crimes against both adults and children. 18 U.S.C. 2241-2245 (1994). As shown above (Part I.C, *supra*), when Congress added state-law counterparts to Section 2252(b)(1) in the 1996 Act, the language it selected corresponded closely with the full range of conduct prohibited by Chapters 110 and 109A. § 121(5), 110 Stat. 3009-30.[12]

ii. Petitioner notes (Br. 25-27) that, in the 1996 Act, Congress limited the state predicates that would trigger enhancements for other child-pornography crimes to crimes against children. For production offenses under Section 2251, Congress limited the state predicates to convictions under laws "relating to the sexual exploitation of children," § 121(4), 110 Stat. 3009-30;

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[12] Petitioner contends (Br. 37-38) that the state sexual-abuse crimes do not correspond with the federal offenses in Chapter 109A because Chapter 109A contains a fourth crime (Section 2244 ("Abusive sexual contact")) that is not listed among the state-law offenses in Section 2252(b)(2). The crimes described in Section 2244, however, fall comfortably within the ambit of offenses "relating to" the named crimes. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (the "ordinary meaning" of the words "relating to" is "a broad one—to stand in some relation.") (citation and internal quotation marked omitted).

and for possession offenses under Section 2252(b)(2), Congress limited the state predicates to convictions under laws "relating to the possession of child pornography," § 121(5), 110 Stat. 3009-30. Petitioner infers (Br. 26-27) from those provisions that, when Congress added prior state convictions "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" to the list of predicates for receipt and distribution offenses in Section 2252(b)(1), it intended for all such predicate offenses to involve minor victims. That is not what the drafting history shows.

For production and possession offenses, Congress initially decided not to include the whole panoply of state-law offenses corresponding to Chapters 110 and 109A. Instead, it included only prior convictions under the state-law analog to the *specific Chapter 110 offense of conviction*. See 18 U.S.C. 2251 ("Sexual exploitation of children"); 2252(a)(4) (possession of child pornography). Because Chapter 110 includes only crimes with minor victims, the subset of state-law analogs that Congress chose to include was necessarily limited to crimes against minors.

iii. Petitioner further contends (Br. 22-25) that Congress has at other times added federal crimes to the list of predicates in Section 2252(b)(2) or related provisions while limiting the state-law counterparts to crimes against children. Petitioner states (Br. 23-24) that Congress has included Chapter 71 "obscenity" offenses (which can involve obscene depictions of both adults and children) in Section 2252(b)(2), but it limited the corresponding state laws to those prohibiting only *child* pornography. That comparison is inapt. The federal counterpart to the state child-

pornography laws that petitioner describes is not Chapter 71 but Chapter 110, which prohibits the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of *child* pornography—the same conduct that the state-law counterpart describes. See 18 U.S.C. 2251, 2252(a). Congress has never added any state obscenity laws, involving depictions of either adults or children, to any child-pornography recidivist enhancement.

Petitioner further notes (Br. 24-25) that Congress has included federal sex-trafficking convictions under Chapter 117 and 18 U.S.C. 1591 (which can involve both adult and minor victims) in the list of predicate offenses for Section 2252(b)(1) and (2), but it has limited the corresponding state-law offenses in Section 2252(b)(1) to those relating to "sex trafficking of children." 18 U.S.C. 2252(b)(1). That aspect of the drafting history of Section 2252(b)(1) reflects only that when Congress adds state-law offenses to the lists of predicate offenses triggering child-pornography recidivist enhancements, it sometimes adds state offenses corresponding to only a subset of the federal offenses that it had previously included. See 1996 Act § 121(4)-(5), 110 Stat. 3009-30 (adding state offenses relating to the production of child pornography to Section 2251 and state offenses relating to the possession of child pornography to Section 2252(b)(2), but omitting state-law counterparts to any other Chapter 110 offense or any Chapter 109A offense).

Federal sex-trafficking crimes under Chapter 117 have been on the list of predicates in Section 2252(b)(1) and (2) since 1998. See 1998 Act § 202(a), 112 Stat. 2977. The addition—eight years later—of only a subset of the state-law counterparts to the

chapter 117 offenses to the list of predicates for receipt and distribution offenses under Section 2252(b)(1), see 2006 Act § 206(b)(2), 120 Stat. 614, sheds no light on what Congress intended when it added state sexual-abuse offenses corresponding to the federal crimes within Chapters 110 and 109A to the list of predicates in 1996.

b. i. Petitioner hypothesizes (Br. 27-29) that Congress may have intentionally limited state sexual-abuse offenses to those involving minors because it feared that state "sexual abuse" statutes might include comparatively minor misdemeanor offenses such as "public lewdness" or "indecent exposure" that would not be serious enough to warrant the recidivist enhancement, or because it wanted to save courts from the trouble of deciding whether new types of sex crimes involving cyberstalking or "revenge porn" were state laws "relating to" sexual abuse of adults.

Congress, however, could not have feared that individual States might adopt excessively broad definitions of "sexual abuse," because the meaning of the generic offenses of "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct involving a minor or ward" do not turn on the particulars of state or federal law, but rather reflect the ordinary, contemporary, and common understanding of those terms. See note 8, *supra*. Nor does petitioner demonstrate that "sexual abuse," as commonly understood, includes public lewdness or indecent exposure directed at an adult.[13] In any event, it is not plausible that Congress

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[13] *United States* v. *Padilla-Reyes*, 247 F.3d 1158 (11th Cir.), cert. denied, 534 U.S. 913 (2001), the sole case on which petitioner relies (Br. 28), suggests only that "sexual abuse of a minor" need not require "physical contact." 247 F.3d at 1163 (citation omitted).

would have addressed such a concern by entirely eliminating all state-law predicates involving adults, including serious offenses such as aggravated sexual assault. Instead, any such concern could easily have been resolved by excepting from Section 2252(b)(2) misdemeanor offenses against adult victims that lacked physical contact.

ii. Petitioner's hypothesis (Br. 27-28) that Congress limited state-law offenses to those involving minors or wards because it was unfamiliar with the scope of state sexual-abuse laws and wanted to ensure that recidivists receiving the enhancement were "sufficiently culpable and dangerous" because they had previously abused *children* fails to account for Congress's indisputable inclusion of state sexual-abuse offenses involving *wards* as predicates that would trigger the recidivist enhancement. 18 U.S.C. 2252(b)(2).

The term "ward" is not, as petitioner suggests (Br. 27) limited to people who are deemed "incapable of consenting to sex by virtue of their status." The common definition of a ward is someone who is "under guard or in guardianship," *Webster's Third New International Dictionary* 2575 (1993), which can include not only minors and others who are placed under a guardian's care, but also prisoners. Indeed, the federal statute prohibiting "sexual abuse of a minor or ward," defines a ward as a person who is in "official detention" in a U.S. jurisdiction or federal prison and "under the custodial, supervisory, or disciplinary

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Because *Padilla-Reyes* relies on the psychological trauma experienced by children who have been used as the object of adult sexual gratification, *id.* at 1163-1164, it does not support the claim that indecent exposure to an adult victim constitutes "sexual abuse."

authority of the person" who has engaged in a sexual act with the detainee. 18 U.S.C. 2243(b)(1)-(2). State statutes prohibit similar conduct.[14] Petitioner does not explain why Congress would want to include state sexual-abuse convictions involving adults only if the victim is a ward, but not serious sexual-abuse crimes perpetrated against other adult victims.

3. The legislative history does not overcome the last-antecedent rule

Petitioner further contends (Br. 29-33) that statements in the legislative history indicate that Congress

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[14] Alaska Stat. §§ 11.41.425(a)(2) and (4)-(6), 11.41.427(a)(1) and (3)-(5) (2014); Ariz. Rev. Stat. Ann. §§ 13-1409(A), 13-1419 (Supp. 2014); Ark. Code Ann. §§ 5-14-110(a)(3)(A) and (4)(A), 5-14-124(a)(1)(A), 5-14-125(a)(4)(A)(i), 5-14-126(a)(1)(A) and (B), 5-14-127(a)(2) (2013); Colo. Rev. Stat. §§ 18-3-402(f), 18-3-404(f) (2014); Conn. Gen. Stat. Ann § 53a-71(a)(5) (West Supp. 2015); Haw. Rev. Stat. Ann. §§ 707-731(1)(c), 707-732(e) (LexisNexis Supp. 2014); Idaho Code Ann. § 18-6110 (Michie Supp. 2015); Ky. Rev. Stat. Ann. §§ 510.060(1)(e), 510.090(1)(e), 510.120(1)(c) (LexisNexis 2014); Me. Rev. Stat. Ann. tit. 17-A, § 253(2)(E) (Supp. 2014); Md. Code Ann., Crim. Law § 3-314(b) (LexisNexis 2012); Mich. Comp. Laws Ann. § 750.520c(1)(i)-(*l*) (West Supp. 2015); Minn. Stat. Ann. §§ 609.344 Subdiv. 1(m), 609.345 Subdiv. 1(m) (West Supp. 2015); Neb. Rev. Stat. Ann. §§ 28-322.01, 28-322.02, 28.322.03 (LexisNexis 2009); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(n), 632-A:3(IV), 632-A:4(III) (LexisNexis 2015); N.J. Stat. Ann. § 2C:14-2(c)(2) (West Supp. 2015); N.M. Stat. Ann. § 30-9-11(E)(2) (Supp. 2014); N.C. Gen. Stat. § 14-27.7(a) (2013); N.D. Cent. Code §§ 12.1-20-06, 12.1-20-07(1)(d) (2012); Ohio Rev. Code Ann. § 2907.03(A)(6) and (11) (LexisNexis 2014); Okla. Stat. Ann. tit. 21, § 888(B)(4) (West 2015); 18 Pa. Cons. Stat. Ann. § 3124.2(a) and (a.1) (West Supp. 2015); Tex. Penal Code Ann § 22.011(b)(11) (West 2011); Vt. Stat. Ann. tit. 13, § 3257 (2009); Va. Code Ann. § 18.2-64.2 (2014); Wis. Stat. Ann. § 940.225(2)(h) and (i) (West Supp. 2014); Wyo. Stat. Ann. § 6-2-303(a)(vii) (2013).

understood the state sexual-abuse predicates in Section 2252(b)(2) to relate only to crimes against children. Because the meaning of Section 2252(b)(2) is clear, "there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997); accord *Boyle* v. *United States*, 556 U.S. 938, 950 (2009). In any event, the scant history of the recidivist enhancement for state sexual-abuse offenses provides no basis for concluding that "aggravated sexual abuse" and "sexual abuse" offenses must arise under state sexual abuse laws that require a minor or ward victim.

As noted above, see pp. 6-7, *supra*, Congress first added the relevant statutory language to Sections 2252(b)(1) and 2252A(b)(1) in the 1996 Act. A related Senate Report described Section 2252A(b)(1) as follows: "[A] repeat offender with a prior conviction under chapter 109A or 110 of title 18, or under *any State child abuse law* or law relating to the production, receipt or distribution of child pornography would be fined and imprisoned for not less than 5 years nor more than 30 years." Senate Report 9 (emphasis added). Furthermore, the legislative history of the 1998 Act includes a letter (Pet. Br. 31-33) to Congress from the Department of Justice encouraging Congress to bring the state-law predicates for possession offenses under Section 2252(b)(2) into line with the more expansive list of state-law predicates that would trigger the recidivist enhancement for receipt and distribution offenses under Section 2252(b)(1). The letter noted that, under the 1996 Act, "there [wa]s no enhanced provision for those individuals charged with possession of child pornography who have *prior convictions for child abuse*," and it suggested "an

increased mandatory minimum sentence of [two] years for individuals charged with a violation of any subsection of 2252 or 2252A, if the individual had a prior conviction for sexual abuse *of a minor*." H.R. Rep. No. 557, 105th Cong., 2d Sess. 31 (1998) (emphasis added).

Those statements in the legislative history are imprecise. They are both overinclusive (because the recidivist enhancement covers only a small subset of "[s]tate child abuse" convictions, *i.e.*, those involving *sexual* abuse) and underinclusive (because the statements do not account for the full scope of state-law offenses covered by the language of the enhancement, including sexual abuse of wards). Because those statements misdescribe the statutory language, they provide no persuasive evidence of its meaning or scope. "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

Even if those statements had referred to "any State child sexual abuse law," the statements would not demonstrate that only such convictions can trigger Section 2252(b)(2)'s recidivist enhancement. Instead, the statements would reflect the undisputed fact that child sexual-abuse offenses are included among the state sexual-abuse convictions that will trigger an enhanced statutory sentencing range. The statements are best understood as attempts to condense and simplify the categories of state crimes being added to the recidivist enhancement. Indeed, the Senate Report describes the state child-pornography offenses being added to the list as "law[s] relating to the pro-

duction, receipt or distribution of child pornography," Senate Report 9, a shorthand (but incomplete) way of describing the full range of state child-pornography crimes that Congress had added, *i.e.*, laws relating to the "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography," 1996 Act § 121(5), 110 Stat. 3009-30.

C. The Rule Of Lenity Does Not Apply

Finally, petitioner (Br. 39-43) invokes the rule of lenity to support his narrow construction of Section 2252(b)(2)'s recidivist enhancement. The rule of lenity is a tie-breaking rule of statutory construction that applies only "at the end of the process of construing what Congress has expressed." *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013) (citation omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998). Instead, as this Court has repeatedly emphasized, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich*, 133 S. Ct. at 2209.

This case provides "no work for the rule of lenity to do." *Maracich*, 133 S. Ct. at 2209. Interpreted using the ordinary tools of statutory construction, Section 2252(b)(2)'s recidivist enhancement for state sexual-abuse offenses is clear. The limiting phrase "involving a minor or ward" modifies only its last antecedent, *i.e.*, "abusive sexual conduct." That interpretation accounts for the parallel enhancement for federal

sexual-abuse offenses involving adults, avoids giving two (out of three) categories the identical scope, and advances (rather than thwarts) the statutory purposes. For all of those reasons, the statutory language is not ambiguous—and certainly not "grievous[ly]" so. *Ibid.*; see J.A. 24 (rejecting the rule of lenity because the statutory text allowed the court of appeals "to make far more than a guess as to what Congress intended") (citations and internal quotation marks omitted). The rule of lenity should not be applied.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. 18 U.S.C. 2241 provides:

Aggravated sexual abuse

(a) BY FORCE OR THREAT.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) BY OTHER MEANS.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) WITH CHILDREN.—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State

offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) STATE OF MIND PROOF REQUIREMENT.—In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

2. 18 U.S.C. 2242 provides:

Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

3. 18 U.S.C. 2243 provides:

Sexual abuse of a minor or ward

(a) OF A MINOR.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) OF A WARD.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of

any Federal department or agency, knowingly engages in a sexual act with another person who is—

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(c) DEFENSES.—(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) STATE OF MIND PROOF REQUIREMENT.—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

4. 18 U.S.C. 2244 provides:

Abusive sexual contact

(a) SEXUAL CONDUCT IN CIRCUMSTANCES WHERE SEXUAL ACTS ARE PUNISHED BY THIS CHAPTER.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—

(1) subsection (a) or (b) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(5) subsection (c) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.

(b) IN OTHER CIRCUMSTANCES.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

(c) OFFENSES INVOLVING YOUNG CHILDREN.—If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

5. 18 U.S.C. 2246 provides:

Definitions for chapter

As used in this chapter—

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means—

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency; and

(6) the term "State" means a State of the United States, the District of Columbia, and any commonwealth, possession, or territory of the United States.

6. 18 U.S.C. 2251 provides:

Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for

the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign

commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

7. 18 U.S.C. 2252 provides:

Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or un-

der the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform

Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

8. 18 U.S.C. 2252A provides:

Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or

affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other materi-

al that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce,

for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

(7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor.[1]

shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense

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[1] So in original. The period probably should be a comma.

involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(3) Whoever violates, or attempts or conspires to violate, subsection (a)(7) shall be fined under this title or imprisoned not more than 15 years, or both.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) ADMISSIBILITY OF EVIDENCE.—On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) CIVIL REMEDIES.—

(1) IN GENERAL.—Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) RELIEF.—In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(g) CHILD EXPLOITATION ENTERPRISES.—

(1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

(2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

9. 18 U.S.C. 2260 provides:

Production of sexually explicit depictions of a minor for importation into the United States

(a) USE OF MINOR.—A person who, outside the United States, employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who

transports any minor with the intent that the minor engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, intending that the visual depiction will be imported or transmitted into the United States or into waters within 12 miles of the coast of the United States, shall be punished as provided in subsection (c).

(b) USE OF VISUAL DEPICTION.—A person who, outside the United States, knowingly receives, transports, ships, distributes, sells, or possesses with intent to transport, ship, sell, or distribute any visual depiction of a minor engaging in sexually explicit conduct (if the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct), intending that the visual depiction will be imported into the United States or into waters within a distance of 12 miles of the coast of the United States, shall be punished as provided in subsection (c).

(c) PENALTIES.—

(1) A person who violates subsection (a), or attempts or conspires to do so, shall be subject to the penalties provided in subsection (e) of section 2251 for a violation of that section, including the penalties provided for such a violation by a person with a prior conviction or convictions as described in that subsection.

(2) A person who violates subsection (b), or attempts or conspires to do so, shall be subject to the

penalties provided in subsection (b)(1) of section 2252 for a violation of paragraph (1), (2), or (3) of subsection (a) of that section, including the penalties provided for such a violation by a person with a prior conviction or convictions as described in subsection (b)(1) of section 2252.

APPENDIX B

CHAPTER 71—OBSCENITY

Sec.

1460. Possession with intent to sell, and sale, of obscene matter on Federal property.

1461. Mailing obscene or crime-inciting matter.

1462. Importation or transportation of obscene matters.

1463. Mailing indecent matter on wrappers or envelopes.

1464. Broadcasting obscene language.

1465. Transportation of obscene matters for sale or distribution.[1]

1466. Engaging in the business of selling or transferring obscene matter.

1466A. Obscene visual representation of the sexual abuse of children.

1467. Criminal forfeiture.

1468. Distributing obscene material by cable or subscription television.

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[1] Section catchline amended by Pub. L. 109-248 without corresponding amendment of chapter analysis.

1469. Presumptions.

1470. Transfer of obscene material to minors.

CHAPTER 109A—SEXUAL ABUSE

Sec.

2241. Aggravated sexual abuse.

2242. Sexual abuse.

2243. Sexual abuse of a minor or ward.

2244. Abusive sexual contact.

2245. Sexual abuse resulting in death.[1]

2246. Definitions for chapter.

2247. Repeat offenders.

2248. Mandatory restitution.

---

[1] Section catchline amended by Pub. L. 109-248 without corresponding amendment of chapter analysis.

CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

Sec.

2251. Sexual exploitation of children.

2251A. Selling or buying of children.

2252. Certain activities relating to material involving the sexual exploitation of minors.

2252A. Certain activities relating to material constituting or containing child pornography.

2252B. Misleading domain names on the Internet.

2252C. Misleading words or digital images on the internet.

2253. Criminal forfeiture.

2254. Civil forfeiture.

2255. Civil remedy for personal injuries.

2256. Definitions for chapter.

2257. Record keeping requirements.

2257A. Recordkeeping requirements for simulated sexual conduct.[1]

2258. Failure to report child abuse.

2258A. Reporting requirements of electronic communication service providers and remote

---

[1] So in original. Does not conform to section catchline.

computing service providers.

2258B. Limited liability for electronic communication service providers and remote computing service providers.[1]

2258C. Use to combat child pornography of technical elements relating to images reported to the CyberTipline.

2258D. Limited liability for the National Center for Missing and Exploited Children.

2258E. Definitions.

2259. Mandatory restitution.

2260. Production of sexually explicit depictions of a minor for importation into the United States.

2260A. Increased penalties for registered sex offenders.[1]

CHAPTER 117—TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES

Sec.

2421. Transportation generally.

2422. Coercion and enticement.

2423. Transportation of minors.

2424. Filing factual statement about alien individual.

2425. Use of interstate facilities to transmit information about a minor.

2426. Repeat offenders.

2427. Inclusion of offenses relating to child pornography in definition of sexual activity for which any person can be charged with a criminal offense.

2428. Forfeitures.

No. 14-8358

Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AVONDALE LOCKHART,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS... i

TABLE OF CITED AUTHORITIES iii

PRELIMINARY STATEMENT 1

ARGUMENT..... 2

I. "Involving a minor or ward" modifies "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct." 2

A. The series-qualifier rule, not the last-antecedent rule, applies..... 2

B. Petitioner's reading makes sense because, unlike respondent's, it gives effect to "involving a minor or ward."..... .6

C. The statute's context and structure do not support respondent's reading.. ...12

1. Congress intended to treat prior federal and state convictions differently. 12

2. The titles of the chapter 109A offenses do not support respondent's reading. .... .15

Table of Contents

Page

3. Section 2251(e) supports petitioner, not respondent..... 16

D. The original understanding confirms petitioner's reading. 17

E. The statute's purpose does not support respondent's reading. .... .18

1. Respondent's purpose-based argument is circular..... 18

2. Petitioner's reading is consistent with the statute's purpose..... ...19

II. The rule of lenity requires reversal because respondent's reading is not unambiguously correct..... 22

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

CASES

Barnhart v. Thomas,
540 U.S. 20 (2003)... ....3, 4, 5

Conn. Nat. Bank v. Germain,
503 U.S. 249 (1992)..... 8

Descamps v. United States,
133 S. Ct. 2276 (2013).... 20

Duncan v. Walker,
533 U.S. 167 (2001)... 10

Fed. Trade Comm'n v. Mandel Bros.,
359 U.S. 385 (1959).. 5

Freeman v. Quicken Loans, Inc.,
132 S. Ct. 2034 (2012)..... ....7, 8

Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson,
559 U.S. 280 (2010)..... 8-9

Great Western Ry. Co. v. Swindon & Cheltenham Ry. Co.,
(1884), 9 App. Cas. 787. 3

Green v. Bock Laundry Mach. Co.,
490 U.S. 504 (1989)... 7

Cited Authorities

Page

Harbison v. Bell,
556 U.S. 180 (2009). 14

Jama v. Immigration & Customs Enf't,
543 U.S. 335 (2005) 5

Johnson v. United States,
135 S. Ct. 2551 (2015).... .... .20

Marx v. Gen. Revenue Corp.,
133 S. Ct. 1166 (2013). 9

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993)..... 19

Microsoft v. i4i Ltd. P'ship,
131 S. Ct. 2238 (2011)... 9

Mohamad v. Palestinian Auth.,
132 S. Ct. 1702 (2012). 19

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013)..... 20

Nijhawan v. Holder,
557 U.S. 29 (2009)..... 20

Paroline v. United States,
134 S. Ct. 1710 (2014).. 4

Cited Authorities

Page

Pavelic & LeFlore v. Marvel Entm't Grp.,
493 U.S. 120 (1989)..... 14

Porto Rico Ry., Light & Power Co. v. Mor,
253 U.S. 345 (1920).... ....3, 4

Rewis v. United States,
401 U.S. 808 (1971)... 4

Roberts v. Sea-Land Servs.,
132 S. Ct. 1350 (2012). 17

Rodriguez v. United States,
480 U.S. 522 (1987).. 19

Simpson v. United States,
435 U.S. 6 (1978).... 5-6

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004).. ....16, 17

Taylor v. United States,
495 U.S. 575 (1990).. ....18, 19

TRW Inc. v. Andrews,
534 U.S. 19 (2001)... 12

TVA v. Hill,
437 U.S. 153 (1978). .... .14

Cited Authorities

Page

United States v. Bass,
404 U.S. 336 (1971). 1, 3, 4, 5

United States v. Butler,
297 U.S. 1 (1936).... 10

United States v. Granderson,
511 U.S. 39 (1994).... 23

United States v. Hayes,
555 U.S. 415 (2009)..... .... .20, 23

United States v. Mateen,
764 F.3d 627 (6th Cir. 2014) (en banc) 14

United States v. McCutchen,
419 F.3d 1122 (10th Cir. 2005)..... 20

United States v. Olano,
507 U.S. 725 (1993)..... 8

United States v. Osborne,
551 F.3d 718 (7th Cir. 2009).. 11

United States v. Padilla-Reyes,
247 F.3d 1158 (11th Cir. 2001)... 11

United States v. Rezin,
322 F.3d 443 (7th Cir. 2003) 14, 20

Cited Authorities

Page

United States v. Santos,
553 U.S. 507 (2008). 18, 19

United States v. Standard Brewery, Inc.,
251 U.S. 210 (1920).. .... .3, 4, 10

United States v. Thomas,
159 F.3d 296 (7th Cir. 1998).. 11

W. Va. Univ. Hosps. v. Casey,
499 U.S. 83 (1991). .... .19

CONSTITUTION, STATUTES, AND OTHER AUTHORITIES

U.S. Const. amend. V 6

U.S. Const. art. I, § 3, cl. 7.... 6

10 U.S.C. § 920. 12

18 U.S.C. § 1460(a)..... .... .13

18 U.S.C. § 2241... ....15, 16

18 U.S.C. § 2241(c).. 16

18 U.S.C. § 2242... ....15, 16

Cited Authorities

Page

18 U.S.C. § 2243 15

18 U.S.C. § 2244 ....15, 16

18 U.S.C. § 2244(a). .... .15

18 U.S.C. § 2251(e). 13, 16, 17

18 U.S.C. § 2252 ....6, 22

18 U.S.C. § 2252(a)(1). 6

18 U.S.C. § 2252(b)(1) ... .13

18 U.S.C. § 2252(b)(2) ... . *passim*

18 Pa. Cons. Stat. Ann. § 3122.1(b) 21

21 Okla. Stat. Ann. tit. 21, § 1123 21

720 Ill. Comp. Stat. Ann. § 5/11-140 21

Alaska Stat. § 11.41.434 ....8, 21

Ariz. Rev. Stat. Ann. § 13-1405 21

Ariz. Rev. Stat. Ann. § 13-1405(A) 8

Cal. Penal Code § 261.5(d) 21

Cal. Penal Code § 269 21

Cited Authorities

Page

Colo. Rev. Stat. § 18-3-405 21

Conn. Gen. Stat. § 53a-70c 21

D.C. Code Ann. § 22-3008 21

D.C. Code Ann. § 22-3013. 8

Fed. R. Crim. P. 52(b) 8

Fla. Stat. § 794.011(2)(a) 21

Fla. Stat. § 794.011(4)(a) 21

Fla. Stat. § 794.011(5)(a) 21

Ga. Code Ann. § 16-6-4(d)(1) 21

Idaho Code § 18-1506 21

Idaho Code § 18-1508A 21

Ind. Code Ann. § 35-42-4-3 21

Ind. Code Ann. § 35-42-4-9 8

Mass. Ann. Laws ch. 265 21

Mass. Ann. Laws ch. § 22A 21

Md. Code Ann., Crim. Law § 3-602. 21

Cited Authorities

Page

Mich. Comp. Laws Ann. 750.145c 8

Miss. Code Ann. § 97-5-23 ... .21

Mo. Ann. Stat. § 566.067(1)... .... .21

N.C. Gen. Stat. § 14-27.2A(a) .... .21

N.C. Gen. Stat. § 14-27.4A 21

N.C. Gen. Stat. § 14-27.7A. . ... .21

N.D. Cent. Code Ann. § 12.1-20-06..... 8

N.M. Stat. Ann. § 30-6-1(E). .... .21

N.Y. Penal Law § 130.30(1).. .... .21

N.Y. Penal Law § 130.75 ....8, 21

Neb. Rev. Stat. Ann. § 28-319.01..... 21

Neb. Rev. Stat. Ann. § 28-320.01..... 21

Nev. Rev. Stat. Ann. § 200.508..... 21

R.I. Gen. Laws § 11-37-8.1 ... .21

S.C. Code Ann. § 16-3-655 21

Tenn. Code Ann. § 39-13-522..... 21

Cited Authorities

Page

Tenn. Code Ann. § 39-13-531 21

Tex. Penal Code Ann. § 21.11. 21

Utah Code Ann. § 76-5-402.1. 21

Utah Code Ann. § 76-5-402.3.... .... .21

Utah Code Ann. § 76-5-403.1..... 21

Utah Code Ann. § 76-5-404.1..... 8

Vt. Stat. Ann. tit. 13, § 3253a. .... .21

Wash. Rev. Code Ann. § 9A.44.073 .... .21

Wis. Stat. § 948.02... .... .21

Wyo. Stat. § 6-2-314... 21

2 Wayne R. LaFave, *Substantive Criminal Law* § 17.4(c) (2d ed. 2014). 11

Adam Walsh Child Protection and Safety Act of 2006, § 206(b)(1)(B), Pub. L. No. 109-248, 120 Stat. 587..... ..... .13

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Cited Authorities

Page

Brief for United States, *United States v. Trogdon*, 339 F.3d 620 (8th Cir. 2003) (No. 02-3233). 7

Child Pornography Prevention Act of 1996, Subsection 7, Pub. L. No. 104-208, 110 Stat. 3009 ... .16

PRELIMINARY STATEMENT

Section 2252(b)(2)'s text, context, structure, and history confirm that "involving a minor or ward" modifies "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct." Respondent's contrary reading falters at every stage.

Respondent mechanically invokes the last-antecedent rule without providing good reasons to apply that canon here. Its textual argument depends almost entirely on the absence of a comma before the modifying phrase, a discretionary punctuation choice to which this Court "will not attach significance." *United States v. Bass*, 404 U.S. 336, 340 n.6 (1971).

Nor does respondent refute petitioner's showing that the series-qualifier principle, which this Court has long applied in circumstances like this, best illuminates the meaning of this statute. Although respondent accuses petitioner of rendering "sexual abuse" and "abusive sexual conduct" redundant, it offers no alternative reading that avoids surplusage. Far from it. By treating "abusive sexual conduct involving a minor or ward" as a mere "subset" of "sexual abuse," respondent renders much of the statutory provision at issue—including the modifying phrase itself—wholly inoperative. That consequence confirms that respondent's reading is wrong.

Respondent's appeal to statutory structure and context fares no better. Congress indisputably treated prior federal and state convictions for the same conduct differently—for example, a prior federal conviction for sex trafficking of an adult triggers the recidivism

enhancement, but a prior state conviction must involve "sex trafficking *of children*." Thus, it is neither "strange" nor unreasonable that Congress likewise limited qualifying prior state sex-abuse convictions to those involving minors or wards. In fact, respondent originally read the statute petitioner's way—although it refuses to acknowledge that now.

Respondent's remaining arguments—that Congress, in § 2252(b)(2), meant to track the federal sex-abuse crimes in chapter 109A (without ever saying so); and that petitioner's reading could allow a "huge number" of child sex offenders to avoid mandatory minimum sentences—are unsupported and unpersuasive.

Finally, even if respondent's reading were plausible, it is not "unambiguously correct," so the rule of lenity requires reversal.

ARGUMENT

I. "Involving a minor or ward" modifies "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct."

A. The series-qualifier rule, not the last-antecedent rule, applies.

Invoking the last-antecedent rule, respondent argues that "involving a minor or ward" modifies only "abusive sexual conduct." Respondent's Brief ("RB") 18–20. But respondent offers no persuasive reason to follow that rule instead of the series-qualifier canon, which this Court has long applied to statutes like § 2252(b)(2). Petitioner's Opening Brief ("OB") 11–18.

Respondent observes that under the last-antecedent rule "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows," and posits that the rule applies unless "overcome by other indicia of meaning." RB 18 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). But statutory interpretation is not a game of "rock-paper-scissors" in which the last-antecedent rule, by default, trumps all others. On the contrary, for statutes written like § 2252(b)(2), the series-qualifier rule, not the last-antecedent rule, reflects "ordinary construction," *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920) (quoting *Great Western Ry. Co. v. Swindon & Cheltenham Ry. Co.*, (1884), 9 App. Cas. 787, 808 (Lord Bramwell)), "the more plausible construction," *Bass*, 404 U.S. at 340, and "the natural construction of the language," *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920).

The choice of the appropriate canon turns not on respondent's imagined interpretive hierarchy, but on the statutory text. And where, as here, a statute contains an integrated list of noun phrases in parallel construction, separated by commas, followed by a modifying phrase that makes grammatical and substantive sense with respect to all, "[i]n the absence of some other indication, the modifier reaches the entire enumeration." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (Thomson/West 2012).

Employing the series-qualifier rule accords with this Court's precedents. The phrase "involving a minor or ward" "is applicable as much to the first and other words" in § 2252(b)(2)'s list of state-law predicates "as to the last." *Porto Rico Ry.*, 253 U.S. at 348. Respondent so

acknowledges by agreeing that "aggravated sexual abuse involving a minor or ward" and "sexual abuse involving a minor or ward" are "potential state-law crimes." RB 32. *See also infra* n.4. But respondent's contention that § 2252(b)(2) does not contain an "integrated" list because "'sexual abuse' and 'abusive sexual conduct' ... are identical rather than 'overlapping,'" RB 34, gets things backwards. The closer the items are in meaning, the *more* integrated the list is, not less. *See* OB 15–16.

Respondent dismisses this Court's century-old line of series-qualifier cases as a "handful of decisions" driven by extrinsic policy considerations. RB 38–40. For example, respondent says, *Bass* declined to adopt a last-antecedent construction only because to do so would have altered the "sensitive relation between federal and state criminal jurisdiction." RB 39 (quoting 404 U.S. at 349). In fact, this Court has grounded its series-qualifier decisions, including *Bass*, first and firmly in the statutory text. *See Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014); *Bass*, 404 U.S. at 339–40; *Porto Rico Ry.*, 253 U.S. at 348; *Standard Brewery*, 251 U.S. at 218. And while *Bass* adduced additional extra-textual support for that approach, the principal such consideration was not comity, as respondent suggests, but "lenity," 404 U.S. at 347 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

Respondent's reliance on *Barnhart* is misplaced. The statutory phrase at issue there—which authorized Social Security benefits if a claimant's disabilities were "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy," 540

U.S. at 21–22 — was unlike § 2252(b)(2). It did not contain a list of parallel terms separated by commas and followed immediately by a modifying phrase. To apply the modifier "which exists in the national economy" to the antecedent "previous work," this Court would have had to leapfrog eighteen words and conclude that Congress intended the awkward locution "previous work which exists in the national economy." Even so, this Court did not hold that the last-antecedent rule applied unambiguously, only that the Social Security Administration's regulation survived deferential *Chevron* review. 540 U.S. at 29.[1]

Congress's decision not to insert a comma before "involving a minor or ward," *see* RB 19, is uninformative. This Court rejected respondent's reliance on an "omitted" comma in *Bass*, *see* 404 U.S. at 340 n.6, and the argument has not improved with age. It remains true that, although "commas at the end of series can avoid ambiguity," the "use of such commas is discretionary," so this Court should "not attach significance" to Congress's punctuation. *Id.* In *Simpson v. United States*, this Court, at respondent's

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1. Neither *Jama v. Immigration & Customs Enf't*, 543 U.S. 335 (2005), nor *Fed. Trade Comm'n v. Mandel Bros.*, 359 U.S. 385 (1959), cited at RB 18, supports application of the last-antecedent rule here. *Jama* declined to apply a modifier to each clause in a preceding series of statutory subparagraphs because "[e]ach clause is distinct and ends with a period, strongly suggesting that each may be understood completely without reading any further." 543 U.S. at 344. Indeed, this Court distinguished *Bass* on just this ground. 543 U.S. at 344 n.4. And in *Mandel Bros.*, this Court agreed that the series-qualifier rule yielded a "possible construction" of the statutory language, one that the Court might have adopted had it been confronted, as here, with "a penal statute that deserves strict construction." 359 U.S. at 389.

urging, disregarded the absence of a comma and applied the series-qualifier rule to the statutory phrase "[w]hoever ... assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." 435 U.S. 6, 11 n.6 (1978). Specifically, this Court agreed that "by the use of a dangerous weapon or device" modified "assaults" as well as "puts in jeopardy." *Id.* Nothing turns on the absence of a comma here, as § 2252 itself reflects. *See* § 2252(a)(1) (covering "[a]ny person who ... knowingly transports or ships *using any means or facility of interstate or foreign commerce*" child pornography, where italicized phrase modifies "transports" as well as "ships").[2]

B. Petitioner's reading makes sense because, unlike respondent's, it gives effect to "involving a minor or ward."

Respondent's principal claim is that petitioner's reading, which treats "sexual abuse involving a minor or ward" and "abusive sexual conduct involving a minor or ward" as synonyms, "runs up against the presumption against surplusage." RB 33. To be crystal clear: This case does not present a choice between one reading that creates surplusage and another that avoids it. Rather, the choice is between petitioner's reading, which entails some redundancy but gives meaning to the modifying phrase "involving a minor or ward," and respondent's, which also includes redundancy but reads "involving a minor or ward"

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2. The Constitution contains some series qualifiers that use commas, *see* RB 19 n.7 (citing U.S. Const. amend. V), and some that do not, *see* U.S. Const. art. I, § 3, cl. 7 (providing that judgment in impeachment cases shall not extend beyond removal from Office "and disqualification to hold and enjoy any Office of honor, Trust or Profit *under the United States*" (modifying phrase emphasized)).

out of the statute altogether. As between these "available alternatives," this Court should select petitioner's, which "does least violence to the text." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring).

Respondent argues that because "sexual abuse" and "abusive sexual conduct" mean the same thing, applying the series-qualifier principle to conclude that "involving a minor or ward" modifies both does not "make sense." RB 16, 32–34, 40. That is mistaken. Respondent acknowledges that the "terms used to describe the generic state-law offenses carry their ordinary, contemporary, and common meaning." RB 22–23 n.8. Petitioner has shown that the ordinary meanings of "sexual abuse" and "abusive sexual conduct" are the same (or nearly so, with any nuances swallowed by "relating to"). OB 17–18. Respondent does not disagree, propose alternative definitions, or identify any behavior that would relate to "abusive sexual conduct" but not "sexual abuse."[3]

Petitioner's interpretation produces no anomaly. This Court has recognized that Congress sometimes speaks redundantly. In *Freeman v. Quicken Loans, Inc.*, for example, this Court interpreted the statutory phrase "portion, split, or percentage" so that the three words "all mean the same thing." 132 S. Ct. 2034, 2043 (2012). This was "a perhaps regrettable but not uncommon sort of lawyerly iteration ('give, grant, bargain, sell, and

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3. Although it now chides petitioner for acknowledging this congruence, respondent has done likewise: "The federal statutes seem to use the terms 'sexual conduct,' 'abusive sexual contact,' and 'sexual abuse' interchangeably." Brief for United States at 7 n.1, *United States v. Trogdon*, 339 F.3d 620 (8th Cir. 2003) (No. 02-3233).

convey')." *Id.* *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 732 (1993) ("errors and defects" in former Fed. R. Crim. P. 52(b) mean same thing); *see also, e.g.*, *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting[.]"). As in *Freeman*, "[i]t is impossible to imagine" "abusive sexual conduct" that does not also relate to "sexual abuse." 132 S. Ct. at 2043.

Contrary to respondent's contention (at 34), the redundancy among "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" is not "inexplicable" but easily explained. Congress understood that states use a variety of terms similar to these to refer to sex crimes committed against children and other vulnerable victims such as wards.[4] Congress used overlapping and redundant terms in § 2252(b)(2) to emphasize that prior convictions qualify as state predicates if they "relat[e] to" a broad range of sexually abusive behavior involving a child or ward, regardless whether a state labels the offense "aggravated sexual abuse of a minor," "sexual abuse of a minor," or "abusive sexual conduct involving a minor." As a matter of ordinary usage, "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" do not represent distinct concepts, crisply defined, but rather evoke a common "core of meaning," *Graham County*

4. *See, e.g.*, Alaska Stat. § 11.41.434 ("sexual abuse of a minor"); Ariz. Rev. Stat. Ann. § 13-1405(A) ("sexual conduct with a minor"); D.C. Code Ann. § 22-3013 ("sexual abuse of a ward"); Ind. Code Ann. 35-42-4-9 ("sexual misconduct with a minor"); Mich. Comp. Laws Ann. 750.145c ("child sexually abusive activity or material"); N.D. Cent. Code Ann. § 12.1-20-06 ("sexual abuse of wards"); N.Y. Penal Law § 130.75 ("course of sexual conduct against a child"); Utah Code Ann. § 76-5-404.1 ("sexual abuse of a child" and "aggravated sexual abuse of a child").

Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280, 289 n.7 (2010), namely, wrongful sexual behavior. Thus, contrary to respondent's position, it makes perfect sense to interpret "involving a minor or ward" as applicable to all three categories.[5]

Respondent agrees that some redundancy is unavoidable in this statute. Consequently, the rule against surplusage is not dispositive. *See, e.g., Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013); *Microsoft v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011). Respondent's interpretation, however, creates *unnecessary* surplusage and strips "involving a minor or ward" of any effect at all. That implausible result follows from respondent's position that "'aggravated sexual abuse' (and 'abusive sexual conduct involving a minor or ward') are properly viewed as subsets of the generic offense of 'sexual abuse.'" RB 33. Thus, under respondent's reading, both "aggravated sexual abuse" and "abusive sexual conduct involving a minor or ward" *have no effect*. Put another way, § 2252(b)(2) would mean exactly the same thing if it said: "a prior conviction ... under the laws of any State relating to sexual abuse," *period*—that is, if Congress *had never written* these two statutory phrases, including the modifying phrase that this Court granted certiorari to construe.

That approach would, no doubt, make it far easier for federal prosecutors to secure these severe mandatory minimum sentences, but it is at odds with basic principles

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5. Respondent does not dispute that Congress could easily have drafted § 2252(b)(2) so that "involving a minor or ward" would modify only "abusive sexual conduct." *See* OB 20–21.

of statutory construction. The words "involving a minor or ward" "cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936). And this Court is "especially unwilling" to treat a statutory term as surplusage "when the term occupies so pivotal a place in the statutory scheme." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). In just these circumstances, this Court has applied the series-qualifier canon, not the last-antecedent rule, to avoid exactly the result respondent proposes. *See Standard Brewery*, 251 U.S. at 218. The statute at issue there prohibited the use of food products to make "beer, wine, or other intoxicating malt or vinous liquors for beverage purposes." *Id.* at 217–18. Respondent argued that the prohibition extended to "beer and wine whether intoxicating or not." *Id.* at 218. But this Court disagreed, recognizing that respondent's reading rendered "the qualifying words 'other intoxicating' ... quite superfluous" because, if respondent were right, "it would have been enough to have written the act without the qualifying words." *Id.*

Respondent advances the precise approach rejected in *Standard Brewery*, namely, that when Congress wrote the words "involving a minor or ward" it meant those words to have no independent effect.[6] Respondent hypothesizes that "abusive sexual conduct involving a minor or ward," although subsumed by "sexual abuse,"

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6. Instead, respondent suggests, Congress included those words merely for emphasis—to "clarify[]" that the recidivist enhancement applies to "specialized and particularly serious" forms of "sexual abuse." RB 33. That is improbable. No reader would expect that a defendant with a prior conviction under a state law relating to "sexual abuse" might escape § 2252(b)(2)'s recidivist enhancement because he used violence or molested a child.

was nonetheless included in § 2252(b)(2) to "remove[] any doubt" that "consensual" offenses such as statutory rape count as state-law predicates. RB 33–34. That supposition is unlikely. Courts routinely conclude that statutory rape constitutes sexual abuse. *E.g.*, *United States v. Thomas*, 159 F.3d 296, 298 (7th Cir. 1998) (citing Illinois statute treating statutory rape as "aggravated criminal sexual abuse"). It is a longstanding principle of criminal law that minority renders consent ineffective, 2 Wayne R. LaFave, *Substantive Criminal Law* § 17.4(c) (2d ed. 2014), and "[s]exual conduct without voluntary consent is abusive," *United States v. Osborne*, 551 F.3d 718, 720 (7th Cir. 2009).

Similarly, respondent suggests (but does not affirmatively state, doubtless to preserve its options in future cases) that offenses such as "public lewdness or indecent exposure directed at an adult" might not relate to "sexual abuse." RB 44 & n.13. But why not? As a matter of language, exposing one's genitals to a stranger "misuses" and "maltreats" that stranger for purposes of sexual gratification. *See* OB 16–18. And it is difficult to see how, for example, an elderly person waiting alone at a bus stop at night would not suffer "psychological trauma" having "been used as the object of adult sexual gratification" by someone who exposes himself. RB 45 n.13. *United States v. Padilla-Reyes*, which relies on examples of conduct involving adults to conclude that "sexual abuse" does not require physical contact, says as much. 247 F.3d 1158, 1163 (11th Cir. 2001) (citing a newspaper article discussing verbal sexual abuse of an adult woman). Respondent has not identified an actual (or even a realistic hypothetical) case that would require a federal prosecutor to prove that a defendant's prior state conviction related to "abusive sexual conduct involving a minor or ward." This Court

will not adopt an interpretation of statutory language that "would in practical effect render" that language "entirely superfluous in all but the most unusual circumstances." *TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001). Although both parties' constructions entail some surplusage, petitioner's gives effect to "involving a minor or ward." Respondent's, by contrast, makes that provision a legal nullity. To affirm, this Court would have to conclude that Congress drafted the words "involving a minor or ward" but meant them to have no practical effect.

C. The statute's context and structure do not support respondent's reading.

1. Congress intended to treat prior federal and state convictions differently.

Respondent contends that context further supports its reading because § 2252(b)(2)'s recidivist enhancement applies to a defendant with a prior conviction under enumerated provisions of federal law (chapters 71, 109A, 110, and 117 of title 18, and 10 U.S.C. § 920) encompassing adult and minor victims, so state convictions should not be limited to those involving minors. RB 20–23.

Contrary to respondent's inference, § 2252(b)(2)'s disparate treatment of federal and state convictions is intended and inescapable. As petitioner has shown, § 2252(b)(2) has included a recidivist enhancement for certain federal convictions—but not state convictions for the same conduct—since the statute's enactment in 1978. OB 22–27. Respondent correctly acknowledges that federal offenses under chapter 71 (entitled "Obscenity"), which "can involve obscene depictions of both adults

and children," count as predicates, while state-law predicates must involve child pornography. Thus, a defendant previously convicted of a federal obscenity offense involving adult pornography (say, selling obscene adult pornography within federal jurisdiction, § 1460(a)) would receive § 2252(b)(2)'s recidivist enhancement, while a defendant previously convicted of selling the same pornography under state law would not. The resulting asymmetry—federal convictions involving obscene depictions of adults and children count; state convictions must involve children—is manifest.

Likewise misguided is respondent's attempt to dismiss the fact that § 2252(b)(1) limits state sex-trafficking predicates to offenses against children while punishing federal offenses involving both adults and minors. RB 43–44. That difference is of no moment, respondent contends, because it arose in 2006 and so "sheds no light on what Congress intended when it added state sexual-abuse offenses ... to the list of predicates in 1996." RB 44. Of course, respondent elsewhere hastens to divine the 1996 Congress's intent from the same 2006 legislation. *See* RB 36–37 (citing Adam Walsh Child Protection and Safety Act of 2006, § 206(b)(1)(B), Pub. L. No. 109-248, 120 Stat. 587, 614 (codified at § 2251(e)). More to the point, however, is respondent's key concession that "when Congress adds state-law offenses to the lists of predicate offenses triggering child-pornography recidivist enhancements, it sometimes adds state offenses corresponding to only a subset of the federal offenses that it had previously included." RB 43. That is precisely petitioner's point. Congress, whatever its reasons, has many times elected to define federal predicate offenses more broadly than their state counterparts, almost always by limiting the latter to offenses against children.

Respondent finds nothing untoward about this decision in general—nor would it matter if respondent did. Even this Court's "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." *TVA v. Hill*, 437 U.S. 153, 194 (1978). "Nor should this Court's approach to statutory construction be influenced by the supposition that 'it is highly unlikely that Congress intended' a given result." *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring). A court's inability to identify a "logical reason" for Congress's differential treatment of federal and state convictions for the same conduct, *United States v. Mateen*, 764 F.3d 627, 631–32 (6th Cir. 2014) (en banc), or its view that such a choice would be "strange," *United States v. Rezin*, 322 F.3d 443, 448 (7th Cir. 2003), offers no reason to override § 2252(b)(2)'s plain text. This Court's task "is to apply the text, not to improve on it." *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989). In any case, there are cogent reasons for Congress's choice. *See* OB 27–29. The universe of state sex offenses is so broad and wide-ranging in seriousness (including misdemeanors) that Congress, concerned with the link between child pornography and other child sex offenses, could reasonably decide to limit the qualifying crimes to those against children.

2. The titles of the chapter 109A offenses do not support respondent's reading.

Respondent perceives a "strong similarity" between the chapter 109A offenses of "aggravated sexual abuse," "sexual abuse," and "sexual abuse of a minor or ward," §§ 2241–43, and § 2252(b)(2)'s list of state predicates. RB 22–23. Because "Sections 2241 and 2242 encompass crimes against adult and minor victims," while "Section 2243 covers only crimes against minors and wards," respondent infers that the same is true of § 2252(b)(2). RB 22. Respondent is mistaken.

First, the parallel is attenuated. "Abusive sexual conduct" is not defined by statute and appears nowhere else in the U.S. Code, which weakens respondent's contention that Congress meant the term to correspond to a chapter 109A offense. Moreover, chapter 109A does not criminalize "abusive sexual conduct involving a minor or ward." It defines two offenses, "sexual abuse of a minor or ward" and "abusive sexual contact," §§ 2243–44, neither of which matches "abusive sexual conduct involving a minor or ward." As petitioner has already shown (OB 37–38), the premise that § 2252(b)(2)'s reference to "abusive sexual conduct involving a minor or ward" necessarily corresponds to § 2243's offense of "sexual abuse of a minor or ward" assumes the answer to the question presented. More plausibly, the relevant parallel (if any) is between "abusive sexual conduct" and the § 2244 offense of "abusive sexual contact." After all, § 2244(a)'s heading refers to "[s]exual conduct." If Congress meant "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" to parallel the federal offenses of "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact," §§ 2241,

2242, and 2244, then it makes perfect sense for the phrase "involving a minor or ward" to modify all three classes of state-law predicates. The §§ 2241, 2242, and 2244 offenses may be committed against adults and minors, so the limiting phrase "involving a minor or ward" would properly apply to all three.[7]

3. Section 2251(e) supports petitioner, not respondent.

Respondent further contends that § 2251(e), as amended in 2006, reflects the intent of the 1996 and 1998 Congresses to limit "involving a minor or ward" to state offenses "relating to ... abusive sexual conduct." RB 36–37. Petitioner has already noted that Congress used different language in § 2251(e) than in § 2252(b)(2), demonstrating its intent to express different meanings. OB 38 n.10 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)). Respondent, however, misunderstands the relevant linguistic shift. It was not, as respondent suggests, merely the substitution of "contact" for "conduct." RB 37. Rather, Congress also deleted the conjunction "or" that appears before "abusive sexual conduct involving a

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7. For the same reasons, respondent is wrong to argue that § 2252(b)(2)'s drafting history reflects the 1996 Congress's intent that the state-law predicates mirror the chapter 109A and 110 offenses. RB 24–25. When the 1996 Congress intended that result, it used precisely targeted language. *See* Child Pornography Prevention Act of 1996, Subsection 7, Pub. L. No. 104-208, 110 Stat. 3009, 3009-31 (recidivist enhancement applies if defendant has prior conviction under certain provisions of federal law "or of a State offense that would have been an offense" under those federal provisions "had the offense occurred in a Federal prison") (codified at § 2241(c)).

minor or ward" in § 2252(b)(2). Had the 2006 Congress understood § 2252(b)(2) as respondent now suggests, it would have imported the relevant state-law language wholesale into § 2251(e): "*aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor or ward*, or sex trafficking of children, or the production ... of child pornography." Instead, Congress deleted the first "or," because only by doing so could it limit the reach of the modifying phrase "involving a minor or ward." Concluding, as respondent does, that this drafting choice has no significance "denies effect to Congress' textual shift, and therefore 'runs afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Roberts v. Sea-Land Servs.*, 132 S. Ct. 1350, 1357 n.5 (2012) (quoting *Sosa*, 542 U.S. at 711 n.9).

D. The original understanding confirms petitioner's reading.

Petitioner has shown that the Department of Justice originally understood "a prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" as synonymous with "prior state convictions for child molestation." OB 31–32 (quoting Letter from Ann M. Harkins, Acting Ass't Att'y Gen., U.S. Dep't of Justice). Remarkably, respondent's answer is to pretend that DOJ said no such thing. Respondent quotes an excerpt of that letter that omits "child molestation" and includes, instead, only the Department's reference to "prior convictions for child abuse." RB 47–48. Respondent then tells this Court, with a straight face, that DOJ's statement was

"imprecise" and "overinclusive" because the Department did not specify that prior state offenses must have been "sexual" in nature. RB 48. Of course, DOJ did just that, and respondent's unwillingness to acknowledge this fact is telling. As a backup position, respondent ventures that DOJ's statements "are best understood as attempts to condense and simplify the categories of state crimes being added to the recidivist enhancement." RB 48. Just so. DOJ (like Congress, which adopted the Department's proposed amendment) understood the state-law predicates, in simplest terms, to encompass sex crimes against minors—that is, "child molestation" offenses.

E. The statute's purpose does not support respondent's reading.

In a last-ditch effort to save its position, respondent leans heavily on what it perceives to be § 2252(b)(2)'s purpose. Respondent warns that, under the categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990), petitioner's reading could allow a "huge number" of child sex offenders to avoid the mandatory penalties of § 2252(b)(2), undermining the statute's supposed objective: "to protect children by ensuring that child-pornography offenders who are convicted sexual predators serve longer prison terms." RB 15, 26. Respondent's argument is unfounded.

1. Respondent's purpose-based argument is circular.

"When interpreting a criminal statute," this Court does "not play the part of a mindreader," *United States v. Santos*, 553 U.S. 507, 515 (2008), but discerns a

statute's purpose from its text, *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98 (1991). Section 2252(b)(2)'s text does not support respondent's self-serving description of the statutory purpose. Rather, that description "is a textbook example of begging the question." *Santos*, 553 U.S. at 515. Respondent *assumes* that Congress meant the recidivism enhancement to apply to offenders with prior convictions under state laws relating to sexual abuse involving adults as well as children, as opposed to just children. But that is "the very issue in the case." *Id.* Respondent's circular appeal to the statute's supposed purpose, unmoored from the text, is thus not a reliable guide to meaning. "[N]o legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987), and respondent's "purposive argument simply cannot overcome the force of the plain text," *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012). *See also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are ... inadequate to overcome the words of its text regarding the *specific* issue under consideration.").

2. Petitioner's reading is consistent with the statute's purpose.

Even if respondent's description of the statute's purpose were correct, it would not defeat petitioner's reading. Respondent argues that, under *Taylor*, petitioner's construction would "eliminate as predicate offenses any conviction under a state law that did not require a minor or ward victim as an element of the offense." RB 15–16. But this Court has not held that the categorical approach applies to the analysis of prior convictions under § 2252(b)(2), and the Courts of Appeals are divided on

that question, *see* Pet. 24–25. Petitioner agrees that the statutory terms "relating to" and "involving a minor or ward" can be read to invite a circumstance-specific inquiry that would make § 2252(b)(2)'s enhancement applicable to any state sex offense against a child, whether the victim's age was an element or not. *See, e.g., United States v. McCutchen*, 419 F.3d 1122, 1126–27 (10th Cir. 2005); *Rezin*, 322 F.3d at 448; *see also, e.g., Nijhawan v. Holder*, 557 U.S. 29 (2009); *United States v. Hayes*, 555 U.S. 415 (2009). This Court need not resolve this dispute in this case because petitioner's prior conviction did not involve a minor or ward under any analysis.

If the categorical approach applies, some offenders who may have committed sexual misconduct against children in the past—but whose crimes of conviction did not categorically involve children—would avoid the mandatory sentencing enhancements of § 2252(b)(2). But the "Government's objection to that underinclusive result is little more than an attack on the categorical approach itself," *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1692–93 (2013), and "there are several decades of water over that dam," *Descamps v. United States*, 133 S. Ct. 2276, 2286 n.3 (2013). "*Taylor* had good reasons to adopt the categorical approach," including "the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). *See also Descamps*, 133 S. Ct. at 2288–89 (reaffirming "the categorical approach's Sixth Amendment underpinnings").

Respondent notes that numerous states have laws that criminalize sexual abuse in general but do not

include as an element the victim's status as a minor or ward, RB 29–31 n.11, but ignores that numerous states also have criminal sexual-abuse statutes that *do* contain these elements.[8] Defendants convicted of these crimes would therefore categorically qualify for the recidivist enhancement under petitioner's reading.

The contrived hypothetical on pp. 28–29 of respondent's brief is thus unpersuasive. If this Court endorses a circumstance-specific inquiry, then neither this example nor any other in respondent's parade of horribles is cause for concern. And if the categorical approach does apply, a defendant who forcibly rapes his 14-year-old daughter is still guilty under New York law of rape in the second degree, N.Y. Penal Law § 130.30(1), which includes, as an element, that the victim is "less than fifteen years old." Either way, respondent's hypothetical defendant would be subject to § 2252(b)(2)'s enhanced penalties, just as Congress intended.

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8. Alaska Stat. § 11.41.434; Ariz. Rev. Stat. Ann. § 13-1405; Cal. Penal Code §§ 269, 261.5(d); Colo. Rev. Stat. § 18-3-405; Conn. Gen. Stat. § 53a-70c; D.C. Code § 22-3008; Fla. Stat. §§ 794.011(2)(a), 794.011(4)(a), 794.011(5)(a); Ga. Code Ann. § 16-6-4(d)(1); Idaho Code §§ 18-1508A, 18-1506; 720 Ill. Comp. Stat. Ann. § 5/11-140; Ind. Code Ann. § 35-42-4-3; Mass. Ann. Laws ch. 265, § 22A; Md. Code Ann., Crim. Law § 3-602; Mo. Ann. Stat. § 566.067(1); Miss. Code Ann. § 97-5-23; Neb. Rev. Stat. Ann. §§ 28-319.01, 28-320.01; Nev. Rev. Stat. Ann. § 200.508; N.M. Stat. Ann. § 30-6-1(E); N.Y. Penal Law § 130.75; 21 Okla. Stat. Ann. tit. 21, § 1123; N.C. Gen. Stat. §§ 14-27.2A(a), 14-27.4A, 14-27.7A; 18 Pa. Cons. Stat. Ann. § 3122.1(b); R.I. Gen. Laws § 11-37-8.1; S.C. Code Ann. § 16-3-655; Tenn. Code Ann. §§ 39-13-522, 39-13-531; Tex. Penal Code Ann. § 21.11; Utah Code Ann. §§ 76-5-402.1, 76-5-402.3, 76-5-403.1; Vt. Stat. Ann. tit. 13, § 3253a; Wash. Rev. Code Ann. § 9A.44.073; Wis. Stat. § 948.02; Wyo. Stat. § 6-2-314.

II. The rule of lenity requires reversal because respondent's reading is not unambiguously correct.

Petitioner has shown (OB 39–43) that § 2252(b)(2) is, at the very least, ambiguous. Even after exhausting all legitimate tools of statutory construction, petitioner's reading is at least as reasonable as respondent's. Thus, petitioner's interpretation must prevail under the rule of lenity.

Respondent answers as it always does, claiming in conclusory fashion that the statute is "not ambiguous—and certainly not grievously so." RB 50. But the circumstances here refute that stock response:

- Petitioner's reading makes both grammatical and logical sense.

- At best for respondent, dueling canons of statutory construction (last-antecedent rule vs. series-qualifier rule) yield contradictory conclusions and fight to a draw.

- Neither side's reading avoids surplusage completely, but only petitioner's gives effect to the key phrase "involving a minor or ward."

- As respondent concedes, Congress has often treated federal and state convictions for the same conduct differently in § 2252, most often by requiring the latter to involve children.

- Respondent, at the time of enactment, gave the statute the same natural reading petitioner does, and conveyed that interpretation to Congress.

- The legislative history points solidly in petitioner's favor.

- Petitioner's reading is at least as consistent with the statute's purpose as respondent's.

Given these circumstances, respondent's interpretation is far from "unambiguously correct." *United States v. Granderson*, 511 U.S 39, 54 (1994). Rather, this is a "textbook case" for applying the rule of lenity. *Hayes*, 559 U.S. at 436 (Roberts, C.J., dissenting).

CONCLUSION

This Court should reverse the judgment below and remand.

Respectfully submitted,

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